85-332

NO.

Supreme Court, U.S.
FILED
AUG 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1985

THE PARISH OF ST. BERNARD, ET AL,
Defendants-Petitioners,
VS.
UNITED STATES OF AMERICA,
Plaintiffs-Respondents.

PETITION OF THE PARISH OF JEFFERSON AND JEFFERSON PARISH COUNCIL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (CONSOLIDATED CASES NOS. 83-3557, 83-3760 and 84-3082)

VOLUME 1

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QUESTIONS PRESENTED FOR REVIEW

Is the Government[1] entitled under a subrogation theory to recover from a community[2] the amounts paid by the Government for flood insurance claims and adjusters' fees on account of flood damages to properties in the community?[3]

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[1] United States of America.

[2] Defined in the National Flood Insurance Act (NFIA) as being "A State or political subdivision thereof which has zoning and building code jurisdiction over a particular area having special flood hazards". 42 U.S.C. §4003 (a) (1).

[3] This case is one of several, pending in various parts of the country, wherein the Government is seeking recovery from states, municipalities and counties for amounts paid by it under the National Flood Insurance Program (NFIP) on account of flood damages and is the first case to decide the said question which is now one of national importance.

PARTIES TO THE PROCEEDING

The only parties, still remaining in the proceedings, are:

United States of America

Federal Emergency Management Agency

State of Louisiana

Parish of St. Bernard

Police Jury of the Parish of St. Bernard

Parish of Jefferson

Jefferson Parish Council

Pontchartrain Levee District

Jefferson Levee District

West Jefferson Levee District

Lake Borgne Basin Levee District

Burk & Associates

Fireman's Fund Insurance Company

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

THE PARISH OF ST. BERNARD ET AL,
Defendants-Petitioner,
VS.
UNITED STATES OF AMERICA,
Plaintiffs-Respondents.

OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *United States v. St. Bernard Parish* is reported in 756 F.2d at page 1116. the "ORDER AND REASONS" of the District Court is in the appendix hereto.

STATEMENT OF JURISDICTION

The opinion and decree of the Court of Appeal was rendered on April 8, 1985 and was entered on the same date. A petition for rehearing and a suggestion for rehearing in banc were filed on April 22, 1985 and were denied by orders of the Court, dated June 7, 1985 and entered on June 10, 1985. The Court has jurisdiction of this petition for certiorari under the provisions of *28 U.S.C.* §*2101(c)*.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations, all of which are set out verbatim in the appendix hereto, are involved in

this case:

42 U.S.C. §4012(c)
42 U.S.C. §4013(a)
42 U.S.C. §410 (a)(b)
44 C.F.R. §61.13 and appendix thereto
42 U.S.C. §4053
42 U.S.C. §4072
44 C.F.R. 59.24

STATEMENT OF THE CASE

(i) *Course of Proceedings and Disposition in Courts Below*

The Government filed this action on behalf of the Federal Emergency Management Agency (FEMA) and the Federal Insurance Administration (FIA), the present and former administrators of the National Flood Insurance Program (NFIP), demanding recovery from defendants, including Jefferson Parish and the Jefferson Parish Council (hereinafter collectively "Parish"), of damages in the amount of $76,389,642.81 allegedly for flood insurance claims and adjusters' fees paid by plaintiff on account of the May 3, 1978 and April 12-13, 1980 floods in the metropolitan New Orleans area and prior floods.[4] Mandatory injunctive relief was also sought ordering the Parish to (a) enforce the base flood elevation requirements for the new development mandated for communities participating in the NFIP, (b) implement and enforce standards to insure that proposed development in flood-prone areas is not approved unless the proposed plans call for adequate

[4] Plaintiff's amended complaint, Article 129 (81-1810 NR 191). In addition, damages in the sum of $17,238,478.14 are demanded for similar payments on account of the floods of April 24-25, 1982 and December 4-5, 1982 (83-2007 NR 1).

drainage to reduce exposure to flood hazards, are consistent with the need to minimize flood damage within the flood-prone area, and require that all public utilities and facilities are located and contracted to minimize or eliminate flood damage, (c) implement and enforce standards to insure that proposed construction in flood-prone areas is not approved unless it is designed and adequately anchored to prevent flotation, collapse or lateral movement of the structure, is to be constructed with materials and utility equipment resistant to flood damage, and is to be constructed by methods and practices that minimize flood damage, and (d) comply with and enforce all other requirements of the National Flood Insurance Act (NFIA) and the regulations promulgated thereunder. Parish filed an alternative motion to strike or to dismiss the Government's demand for alternative relief[5] and, also, a motion for summary judgment.[6] Although no specific ruling was made by the District Court on the alternative motion to strike or to dismiss, the District Court partially granted and denied the motion for summary judgment.[7] To the extent that the motion was granted Parish moved for entry of judgment pursuant to FRCP 54 (b); and in accordance with the direction of the Court judgment was entered in favor of the Parish and against the Government dismissing the Government's contract claim, insofar as the complaint seeks monetary damages but not insofar as the complaint seeks specific performance, and the Government's claim to abate a "public nuisance".[8] The Government appealed

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[5] 81-1810 NR 20.

[6] 81-1810 NR 131.

[7] 81-1810 NR 274.

[8] 81-1810 NR 191.

from this judgment. Parish filed in the Court of Appeals an application under *28 U.S.C. §1292(b)* for an appeal from the interlocutory order partially denying the motion for summary judgment, which was initially denied but was granted upon a motion for reconsideration thereof.[9]

A panel of the Court of Appeals found "that subrogation is available to the United States to the extent permitted by Louisiana law" and "that the United States may pursue any available common law right of recovery against the parish defendants so as to recover for any property the parishes owned and insured under the NFIP", and dismissed the remaining claims of the Government. Parish timely filed a petition for rehearing and a suggestion for rehearing in banc, both of which were denied.

(ii) *Statement of Facts*

The Complaint alleges that on or about October 1, 1971 Parish entered the regular phase of the NFIP; that subsequent thereto thousands of residents of Jefferson Parish obtained flood insurance coverage through that program, and that on May 3, 1978 and again on April 12-13, 1980 substantial flooding occurred which caused damages to homes and businesses, covered under the NFIP, throughout the Parish, as a result whereof the Government was required to pay $76,389,642.81 in flood insurance claims and adjusters' fees. It is contended that these flood damages and the resultant flood insurance claims are the direct and proximate result of willful and negligent acts and omissions of Parish and other defendants in the action. Recovery is sought from Parish under several legal

[9]Miscellaneous Docket No. 83-9103 of the Court of Appeals.

theories:

(a) By electing to enter the NFIP Parish contracted to adopt and enforce land use and control measures consistent with the requirements of the NFIP and failed to do so, thus breaching a contract,

(b) Due to certain willful and negligent acts and omissions Parish and other defendants are liable in tort for the resulting flood damage, and

(c) The activities of Parish and other defendants have caused recurrent flooding, consituting a public nuisance under Federal Common Law, which the Government seeks to abate. [This theory has been abandoned (Government's brief in Court of Appeals, p. 20, fn 19)].

BASIS FOR JURISDICTION IN DISTRICT COURT

The District Court has jurisdiction over the subject matter of this matter pursuant to *28 U.S.C. §1345.*

ARGUMENT

Purpose of the NFIP

Although as expressed in the decision of the Court of Appeals the NATIONAL FLOOD INSURANCE ACT OF 1968 *(42 U.S.C. §4001 et seq.)* was enacted to provide previously unavailable flood insurance protection to property owners in flood prone areas, "the principal purpose in enacting the Program was to reduce, by implementation of adequate land use controls and flood insurance, the massive burden on the federal fisc of the ever-increasing

federal flood disaster assistance."[10] *Till v. Unifirst Federal S. & L. Ass'n.*, 5 Cir., 653 F.2d 152, 159. After 1973 the continued participation of a community in a flood-prone area in the Program cannot be categorized as voluntary, inasmuch as the failure of a community in such an area to join or continue in the Program thereafter would have resulted in its financial suicide due to the harsh remedies imposed upon such a community by the 1973 amendment to the Act, namely, the complete cessation of Federal financial assistance to such a community and the curtailment of any loans to it or its citizens by Federally regulated or insured banking or other financial institutions. *42 U.S.C. §4106 (a) and (b).*

The Parish of Jefferson joined the Program in December, 1971. The form of Flood Insurance Policy containing the subrogation clause, was not published in the Federal Regulations until 1976. *44 C.F.R. §61.13, Appendix A.*

A determination as to whether Congress in enacting the NFIA intended to vest in the Administrator of the Program the power to adopt a regulation authorizing the remedy of subrogation against a participating community, such as, the Parish of Jefferson, should be made only after due consideration of the foregoing facts.

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[10] Two of the purposes of the Act, declared by Congress, were to "(3) require States or local communities, as a condition of future Federal financial assistance, to participate in the Flood Insurance Program and to adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses; and (4) require the purchase of flood insurance by property owners who are being assisted by Federal programs or by Federally supervised, regulated or insured agencies or institutions in the acquisition or improvement of land or facilities located or to be located in identified areas having special flood hazards." *42 U.S.C. §4002(b) (3)(4).*

The Prerequisites for the Recoupment Remedy

Absent statutory authorization or fraud on the part of the party from whom recovery is sought, which is not alleged in this case, the recoupment remedy under a subrogation theory or otherwise is not available to the Government. *United States v. Standard Oil Co.*, 332 U.S. 301, 67 S.Ct. 1604; *McCullough v. Seamans, D.C. Ca., 348 F.Supp. 511; Pennsylvania National Mutual Cas. Ins. Co. v. Barnett*, 5 Cir., 445 F.2d 573; *Crescent Wharf, Etc. v. Barracuda Tanker Corp.*, 9 Cir., 696 F.2d 703.

Absence of Statutory Authorization

The NFIA allows the Secretary (Administrator) to "provide by regulation for general terms and conditions of *insurability* which shall be applicable to properties eligible for flood insurance under Section 4012 of this Title",[11] including specified terms and conditions and, also, "any other terms and conditions relating to *insurance coverage or exclusion* which may be necessary to carry out the purposes of this chapter." *42 U.S.C. §4013(a).* The reliance of the Court of Appeals on *Drewett v. Aetna Casualty & Surety Co.*, 5 Cir., 539 F.2d 496, in support of its conclusion that the above quoted provisions of the statute authorize the adoption of a subrogation remedy is totally misplaced. *Drewett* simply involved a situation where a property owner who applied for and obtained insurance while a flood was in progress could not recover under the "loss-in-progress" principle of insurance law. This related solely to "insurance coverage or exclusion", as distinguished from a remedial right, such as, subrogation.

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[11] 42 U.S.C. 4012(c).

Congress specifically provided in the Act for certain remedial rights in the form of judicial actions. *42 U.S.C. §§ 4053 and 4072; Till v. Unifirst Federal S. & L. Ass'n.*, supra, 653 F.2d at page 160. Further, the NFIA "spoke directly to (the) question" with respect to the other remedies available thereunder,[12] namely, suspension from eligiblity from participation in the NFIP,[13] cessation of Federal financial assistance to them and curtailment of any loans to their citizens by Federally regulated or insured banking or other financial institutions. Having thus addressed the problem, Congress proscribed the application of Federal Common Law in order to permit the assertion of claims for reimbursement under the doctrine of subrogation. As stated by this Court in *City of Milwaukee* (451 U.S. at pp. 313-314, 101 S.Ct. at p. 1791):

> "We have always recognized that Federal Common Law is 'subject to the paramount authority of Congress.' (Citation omitted). It is resorted to 'in absence of an applicable Act of Congress,' and because the Court is compelled to consider federal questions 'which cannot be ansered from Federal Statutes alone'. (Citations omitted)."

If Congress had intended the Government to have a tort remedy under a subrogation theory or otherwise against a community participating in the NFIP, "it knew how to do so and (would have done) so expressly" and

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[12] *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315, 101 S.Ct. 1784, 1791, 68 L.Ed.2d 114; *Till v. Unifirst S. & L. Ass'n.*, supra.

[13] The authority of the Secretary of Housing and Urban Development to adopt and promulgate the regulation to this effect (44 C.F.R. 59.24) is clearly evident in *42 U.S.C. §4012(c)*.

unambiguously. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572, 99 S.Ct. 2479, 2487, 61 L.Ed.2d 82; *Pennhurst State Sch. & Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed. 694. In *Pennhurst* this Court said:

> Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." See *Steward Machine Co. v. Davis*, 301 U.S. 548, 585-598, 57 S.Ct. 883, 890-896, 81 L.Ed.2d 1279 (1937); *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to acertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. Cf. *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 285, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251 (1973); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Surely, the NFIA does not clearly and unambiguously inform communities that by virtue of their participation in the NFIP they are subjecting themselves to tort actions

via a subrogation theory.[14]

Having specifically limited the remedy against such participating communities, Congress precluded the fashioning of a tort remedy against them by means of the adoption of a regulation that would permit the assertion of that type of remedy. This is consistent with the reasoning of this Court in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20, 100 S.Ct. 242, 247, 62 L.Ed.2d 146, wherein it said:

> [4] We view quite differently, however, the respondent's claims for damages and other monetary relief under § 206. Unlike § 215,, § 206 simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If monetary liability to a private plaintiff is to be found, it must be read into the Act. Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. "When a statue limits a thing to be done in a particular mode, it includes the negative of any other mode."

It would have been unconscionable for Congress to have enacted legislation whereunder premiums for flood insurance would have charged by the Government to people of a "community"[15] and to provide in the same statute

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[14] The FIA, apparently recognized the limitations on its sanctions and remedies under the NFIA, as evidenced by *Town of Falmouth, Mass., Bd. of Selectmen v. Hunter*, D.C. Mass., 427 F.Supp. 26, wherein the town sought an injunction to prohibit its suspension from the NFIP.

[15] Although the NFIA *[42 U.S.C. §4003(a)(1)]* narrowly defines

that upon payment to those same people of the amounts of damages, sustained by them as a result of unusual torrential rains to which their communities might be subjected as a result of God's will, for the reimbursement by them to the Government of the precise amounts paid to them by the Government, plus more.[16] In essence, this is what the Government is asking the Courts to decree to be by implication the intent of Congress in enacting the NFIA.[17] Needless to say, the Parish has no funds to reimburse the Government for the losses other than taxes collected from the people of the "community"; and any reimbursement to the Government would essentially by forthcoming from its policyholders to which it sold insurance. This illustrates the absence of any intent on the part of Congress to provide a subrogation remedy to the Government for recoupment of any losses under the NFIA. The failure of Congress to specify a remedy of subrogation against participating communities, strongly indicates its intention to proscribe such a remedy. Therefore, the Secretary (Administrator) was powerless to create by regulation a remedy which Congress

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(footnote 15 continued)
community "as a State or political subdivision thereof", the broader definition of the word is set forth thusly in *Webster's Third New International Dictionary, Unabridged:*

> "a: STATE, COMMONWEALTH b: the people living in a particular place or region and usu. linked by common interests; broadly: the region itself: any population cluster"

[16] Adjusters' fees and expenses.

[17] This would be contrary to the established insurance doctrine that an insurer, paying a loss, is not subrogated for recovery of the amount thereof from its own insured. *State Farm Fire & Casualty Co. v. Sentry Indemnity Co.*, La. App., 316 So.2d 185, 188; *Olinkraft, Inc. v. Anco Insulation, Inc.*, La. App., 376 So.2d 1301, 1303.

did not intend to provide; and the Government cannot assert such a remedy against the defendants in this case. *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156, 53 L.Ed.2d 48; *Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532; *Insurance Co. of North America vs. Gee*, 2 Cir., 702 F.2d 411, 414; *Pacific Gas & Elec. Co. v. U.S.*, 9 Cir., 664 F.2d 1133, 1136.

PRAYER

WHEREFORE, the premises considered, petitioners pray that a writ of certiorari issue herein directing the United States Court of Appeals for the Fifth Circuit to send up to Your Honors the record of the case aforesaid, to the end that the same may be examined by said Court and that Your Honors may remand the case with instructions or take the whole case and pronounce judgment thereon, which said judgment your petitioners pray should be a reversal of the judgment of the Court of Appeals, making available to the Government a subrogation remedy, and the entry of a judgment dismissing all of the plaintiff's demands against your defendants-petitioners.

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CERTIFICATE

I hereby certify that copies of the foregiong petition were this day mailed to the attorney of record for plaintiff-respondent, United States of America, and to all other counsel of record in these consolidated cases.

New Orleans, Louisiana. August 28th, 1985

GERARD M. DILLON

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,
v.
PARISH OF ST. BERNARD, Police Jury of the Parish of St. Bernard, Lake Borgne Basin Levee District, Fosco Enterprises, Inc., Travelers Insurance Co., Parish of Jefferson and Jefferson Parish Council, Regent Development Corp., Jefferson Levee District, Pontchatrain Levee District, Joseph F. Varisco, Jr., and Terry Tedesco, Inc., Defendants-Appellees.

UNITED STATES of America,
Plaintiff-Appellee,
v.
The PARISH OF JEFFERSON, et al.,
Defendants-Appellants.

Nos. 83-3557, 83-3760 and 84-3082.
United States Court of Appeals,
Fifth Circuit.
April 8, 1985.

United States brought suit against Louisiana public and private defendants, alleging that the parish defendants had caused massive flood damage by violating their contractual and regulatory obligations to adopt and enforce flood control measures consistent with the parishes' participation in the national flood insurance program. The United States District Court for the Eastern District of Louisiana, at New Orleans, Adrian G. Duplantier, J., granted defense motions for summary judgment on several claims, and an interlocutory appeal was taken. The Court

of Appeals, Brown, Circuit Judge, held that: (1) national flood insurance program did not form a contract between participating communities and the United States; (2) no implied right of action was available to the United States under the national flood insurance program; (3) United States was not entitled to an injunction to force the parishes to bring into compliance all areas located in flood plains that were in violation of the federal regulations, as it would not be a proper use of judicial power to force parishes to do what they could decide to avoid doing by simply withdrawing from NFIP; (4) subrogation was, however, available to the United States to the extent permitted by Louisiana law; and (5) United States could pursue any available common law right of recovery against the parish defendants so as to recover for any property the parishes owned and insured under the NFIP.

Affirmed in part, reversed in part, and remanded.

Jerre S. Williams, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, WILLIAMS, and GARWOOD, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

I. Overview

In this exceptionally complicated consolidated action we are presented with what is apparently a question

of first impression under the National Flood Insurance Program (NFIP). The United States Government seeks recovery of over $100 million from various Louisiana public and private defendants. The district judge granted the defendants' motions for summary judgement on several of the government's claims. After various procedural maneuvers, both sides sought, and we granted, an interlocutory appeal to resolve the correctness of the district court's summary disposition.

After briefing, an extended oral argument, and a diligent search of the record, we affirm the district court's opinion dismissing the United States' express contractual claim. Since the government abandoned its public nuisance claim on appeal, its dismissal is not before us. We further hold that no implied right of action is available to the United States under the NFIP. We also find that injunctive relief would be ineffectual and accordingly dismiss the government's claim on this ground. However, we do find that subrogation is available to the United States to the extent permitted by Louisiana law. We further hold that the United States may pursue any available common law right of recovery against the parish defendants so as to recover for any property the parishes owned and insured under the NFIP.

II. Case History

The United States instituted two civil actions on behalf of the Federal Emergency Management Agency (FEMA) and the Federal Insurance Administration (FIA), the present and former administrators of the NFIP: (i) No. 81-1808 against the Parish of St. Bernard, the Police Jury of St. Bernard, the Lake Borgne Levy District, the State of

Louisiana, and various home builders, engineers, and surveyors; and (ii) No. 81-1810 against Jefferson Parish, the Jefferson Parish Council, Firemen's Insurance Fund Company, La Fourche Basin, Pontchatrain Levy District, Jefferson and West Jefferson Levy District, Burk and Associates, and other developers, builders, engineers, and surveyors. The two actions were eventually consolidated. After much jockeying for position, discovery was stayed pending the resolution of the legal availability of the claims filed by the United States.

In its actions the United States alleged that the parish defendants caused massive flood damage by violating their contractual and regulatory obligations to adopt and enforce flood control measures consistent with the parishes' participation in the NFIP. The government sought recovery in contract and implied contract. The United States also contended that the defendants were liable to the United States as subrogee under the policies of the property owners who had been insured and paid in full by the NFIP. The government further claimed that the defendants' actions (or inaction) constituted a public nuisance under Louisiana law. However, as above mentioned, the government later abandoned any public nuisance claim.

The government sought recovery of the money paid to the insured property owners, an injunction for the specific performance of all obligations required from the parishes under the NFIP, and prospective injunctive relief requiring the parish and levy district defendants to implement and enforce the flood control measures in order to minimize future damage.

The parish defendants filed motions for summary judgment. On June 29, 1983, the district court entered an order granting the parishes' motions insofar as the government's complaint sought recovery in contract. The district court's order denied the United States' summary judgment motion for specific performance as a remedy for breach of the alleged contract between the parishes and the United States. The district court also refused to grant the government's summary judgment motion on the availability of subrogation.[1] Thus, over the objection of the United States, the district court entered partial final judgments dismissing the governement's public nuisance claim as to all defendants and dismissing the portions of the United States contractual claims insofar as they sought compensation from the parishes.

On July 28, 1983, in response to the defendant's motions, the district court amended its order to reflect that the partial denial of the parishes' motions presented questions of law appropriate for interlocutory appeal under 28 U.S.C. § 1292(b). Meanwhile, the government filed two new actions, No. 83-2077 and 83-2078, against Jefferson Parish and the Levy District defendants, and St. Bernard Parish and the Levy District defendants, to recover for flood insurance claims paid in 1982. In these suits the government did not name any non-governmental entities as defendants. These actions were subsequently consolidated with the prior actions.

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[1] In another portion of its order which is not presently before us, the district court rejected the c laim of Firemen's Insurance Fund Company that the indemnity policy issued by it to Jefferson Parish did not provide coverage for liability on the claims brought against the parish by the United States and declined to dismiss Firemen's from the case or grant it summary judgment.

On August 10, 1983, we denied the parish defendants' application for interlocutory appeal. The United States then moved for reversal of the partial final summary judgments which had been entered against it in appeals No. 83-3557 and 83-3760.

On February 1. 1984, upon a motion for reconsideration, we reversed our prior ruling and granted the defendants leave to pursue an interlocutory appeal. We simultaneously deferred consideration of the government's motion for summary reversal and requested a full briefing on the merits of the government's appeals from the partial dismissal of the public nuisance claims and the contractual claims insofar as they concerned recovery of the United States' payments under the insurance policies. All appeals were consolidated for briefing and argument.

III. The NFIP

The National Flood Insurance Act of 1968, was enacted by Title XIII of the Housing and Urban Development Act of 1968 Public Law 90-448, August 1, 1968, to provide previously unavailable flood insurance protection to property owners in flood prone areas.[2] 42 U.S.C. § 4001 *et seq.*

Dissatisfied with the lack of commitment being made to the prgram by the municipalities to which insurance was available, Congress added additional incentives for communities to participate in the NFIP. Congress' persuasive stick - used as an aid to the insufficient

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[2] Mudslide protection was added to the program by the Housing and Urban Development Act of 1969, Public Law 91-152 (December 14, 1969). Flood related erosion protection was added to the program by the Flood Disaster Protection Act of 1973, Public Law 93-234 (December 31, 1973).

insurance carrot - was the Flood Disaster Protection Act of 1973.[3]

To qualify for the sale of federally subsidized flood insurance, a community was required to adopt and submit as part of its application, flood plain management regulations. These regulations were designed to reduce or avoid future flood damages.

However, the 1968 Act required a risk study to be undertaken for each community before it could become eligible for the sale of flood insurance. Since this requirement resulted in a delay in providing insurance protection, Congress established an Emergency Flood Insurance Program to permit the early sale of insurance in flood prone communities. The emergency program did not affect the requirement that a community adopt adequate flood plain management regulations; it only permitted insurance to be sold before a study was conducted to determine actual risk premium rates for the particular community. The emergency program still required the charging of actual risk premium rates for all new construction, substantial im-

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[3] *See, Texas Landowners' Rights Association v. Harris*, 453 F.Supp. 1025, 1030 (D.D.C.1978). Congress was concerned because many communities decided it was better to remain outside the program and avoid paying any insurance premiums so long as they were able to collect federal disaster relief. The 1973 Act required the purchase of flood insurance on or after March 2, 1974, as a condition to receiving any form of federal or federally related financial assistance for the acquisition or construction of insurable buildings and mobile homes within and identified special flood, mudslide, or flood related erosion hazard area located within any community participating in the program. The Flood Disaster Protection Act also requires that on or after July 1, 1975, or one year after a community has been formally notified by the Director of the Flood Insurance Program of its identification as a commmunity containing one or more special flood hazards, no such federal financial assistance shall be provided unless the community in which the area is located is then participating in the program.

provements, and high limits of coverage on existing structures when a flood insurance rate map became effective.

To qualify for flood insurance, a community was required to apply for the entire area within its jurisdiction.[4] The program requires the community to designate an agency or official with responsibility, authority, and means to implement the specific requirements of the program and to make an annual report concerning the community's participation in the program.. The regulations provide that a community is subject to suspension from the NFIP for failure to implement adequate flood plain management regulations. During a suspension, no flood insurance may be sold or renewed.

Thus, the Act contemplates the participation of both the federal agency charged with the program's oversight and the local community government charged with implementing the agency's flood plain regulations. Under the regulations, however, ultimate responsibility for community compliance remains with the Agency since it has the power to suspend any municipality for lack of compliance with the NFIP.

IV. Resolution of the Issues

[1] Many of the general principles applicable to the judicial interpretation of flood insurance policy provisions have been established by prior decision. Federal law

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[4] Individual property owners may not purchase flood insurance unless they live in a municipality which has entered the prgam. To achieve Congress' goal of preventing widespread flood damage through prophylactic land use restrictions, an individual who voluntarily complies with the regulations still cannot obtain the benefit of the program without local government action.

governs disputes over coverage arising under the National Flood Insurance Act of 1968. *West v. Harris,* 573 F.2d 873, 880-81 (5th Cir.1978), *cert. denied,* 440 U.S. 946, 99 S.Ct. 1424, 59 L.Ed.2d 635 (1979). When such disputes arise, they are resolved under federal law "by drawing upon standard insurance law principles." *Id.* at 881; *Drewett v. Aetna Casualty & Surety Co.,* 539 F.2d 496, 498 (5th Cir.1976). *See Hanover Building Materials v. Guiffrida,* 748 F.2d 1011 (5th Cir.1984). Given the importance and complexity of this case, we discuss each disputed issue separately.

(a) No Express Contract Created

[2, 3] The United States urges that the many letters exchanged between the communities and the agencies charged with implementing the NFIP establish an express contract. In brief, the government reasons that legislation enacted pursuant to the spending power is in the nature of a contract: in return for federal funds, the communities agreee to comply with federally imposed conditions. *Pennhurst State Schools v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981); *United States v. Marion County School District,* 625 F.2d 607, 609 (5th Cir.1980), *cert. denied,* 451 U.S. 910, 101 S.Ct. 1980, 68 L.Ed.2d 298 (1981). We believe that *Pennhurst* is dispositive of the government's contract claim. The clear holding of *Pennhurst* is that a "contract" can arise only when the state knowingly and voluntarily accepts Congress' terms.

> There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal

> moneys, it must do so unambiguously (citations omitted). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst, 451 U.S., at 17, 101 S.Ct. at 1539. Congress failed to make clear in either the statute or regulations that participation in the NFIP created a contract. As a result, the parishes could have no knowing understanding that they would be subjected to almost unlimited liability in actions for monetary damages under the statute by joining the program. We sustain the district court's decision that the NFIP does not form a contract between participating communities and the United States.

(b) No Implied Right of Action

The theory of implied private action is, of course, basically a matter of statutory construction. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15, 100 S.Ct. 242, 245, 62 L.Ed.2d 146 (1979); *Belluso v. Turner Communications Corp.*, 633 F.2d 393, 395 (5th Cir.1980). For over half a century federal courts readily allowed plaintiffs to imply private causes of action. *See, e.g., Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 6, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971); *Texas & P.R.R. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916). The Supreme Court began to reverse this trend in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).[5]

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[5] In more recent cases the Supreme Court has looked almost exclusively to congressional intent - The *Cort v. Ash* criteria being treated as indicia of that intent. *Transamerican Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979).

In response to the United States argument that we should imply a private right of action under the NFIP, we need go no further than our opinion in *Till v. Unifirst Federal Savings & Loan Association*, 653 F.2d 152, 154 (5th Cir.1981). In *Till*, we were asked to read the language and history of the NFIP as affording a cause of action not explicitly provided for by Congress. We analyzed the NFIP under the factors of *Cort v. Ash*: (1) whether the plaintiff is one of a class for whose special benefit the statute was enacted; (2) whether there is an indication of legislative intent to create or deny such remedy; (3) whether such a remedy would be inconsistent with the underlying legislative purpose; and (4) whether the cause of action is one traditionally relegated to state law. *Cort v. Ash, supra*, 422 U.S. at 78, 95 S.Ct. at 2088. As we noted in *Till*, though, in interpreting federal statutues, *Cort* and its progeny have all focused upon the "ultimate issue" of whether is was Congress" intent - either explicit or implicit - to create a private remedy or to deny one. *Till*, at 154.[6]

(footnote 5 continued)
Since deciding *Cort v. Ash*, the Supreme Court has become even more reluctant to imply new private causes of action for damages. *See Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981); *California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981).

[6] As the court observed in *Touche Ross & Co. v. Edward S. Redington*, 442 U.S. 560, 576, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979), the central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort* - the language and focus of the statutue,

Cort v. Ash, supra, 422 U.S. at 78, 95 S.Ct. at 2088. *See California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 1779, 68 L.Ed.2d 101 (1981); *Rogers v. Frito Lay, Inc.*, 611 F.2d 1074, 1078 (5th Cir.1980), *cert. denied*, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980).

[4, 5] Our quest for Congress' intent must being with the Supreme Court's warning that in cases where the statutes and legislative history are silent on the question of private remedy, "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Rosse & Co. v. Redington, supra*, 422 U.S. at 571, 99 S.Ct. at 2486. Clearly, the principal purpose in enacting the NFIP was to reduce through the implementation of adequate land use controls and the availability of subsidized flood insurance, the massiv and ever increasing burdeon of federal flood disaster assistance.[7] Nowhere in an

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(footnote 6 continued)
its legislative history, and its purpose, *see* 422 U.S. at 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 - are ones traditionally relied upon in determining legislative intent.

[7] In 1968, House Report No. 1585 discussed the purposes and need for a flood insurance program. It stated as follows:

> Heavy losses over the years from hurricanes in the coastal areas and from storms in inland areas of the nation dramatize the lack of insurance protection against flood damage. Insurance protection against the risk of destruction cause by tornadoes and other natural catastrophies is generally available, but it is not available against the risk of flood loss.
>
> Communities along the sea coast or in a river basin become completely immobilized following a major flood. Usually they must depend on the federal government and voluntary relief agencies to provide various forms of assistance. Some state and local governments have limited programs to assist flood stricken areas,

examination of the language of the NFIP and its legislative history can we find evidence that Congress had any intent to allow a private cause of action, either expressly or by implication.

While the Supreme Court in *Touche Ross* refused to imply a private cause of action partly because other sections of the same Act expressly provided for private remedies, we find applicable what was obviously the main thrust of the Court's reasoning: "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross & Co. v. Redington, supra*, 442 US. at 572, 99 S.Ct. at 2487. Thus, as we found in *Till*, where the statue by its terms grants no private rights to any identifiable class and prescribes no conduct as unlawful, further inquiry is foreclosed. We follow *Till* and hold that no cause of action may be implied under the NFIP.

(c) No Injunctive Relief Available

[6, 7] It is black letter law that an injunction will not issue when it would be ineffectual. Under the NFIP a com-

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(footnote 7 continued)

> but disaster relief from all of these sources is inadequate to provide for the necessary restoration of heavily damaged areas. These facts underline the need for a program which will make insurance against flood damage available, encourage persons to become aware of the risk of occupying the flood plains, and *reduce the mounting federal expenditure for disaster relief assistance.* H.Rep.No. 1585, 90th Cong., 2d Sess., reprinted in [1968] U.S.Code Cong. & Adm.News 2873, 2966-67.

For further evidence of the interest of Congress in reducing the burden of federal funds through land use controls and insurance, see Senate Report No. 93-583, 93rd Cong., 1st Sess., reprinted in [1973] U.S.Code Cong. & Adm.News 3217, 3218-20, 3223.

munity may withdraw, or it may be suspended by the agency, if it is not in compliance with the regulations governing flood plain construction and management. Nonetheless, the government seeks an injunction to force the parishes to bring into compliance all areas located in flood plains that are in violation of the regulations. The government also seeks a prospective injunction to keep the communities from engaging in future violations.

We can perceive no utility in such a course. Requiring a community to do acts which it may voluntarily choose to avoid is not a proper exercise of judicial power. In no way is community participation in the NFIP required. Deciding to join or remain under the program is a decision left solely by the statute to the local community. This remians true even after Congress created additional incentives to secure more widespread community participation. As a result, it is not a proper use of judicial power to force the parishes to do what they may decide to avoid doing by simply withdrawing from the program.

Similarly, requiring a community to undertake expensive reconstruction projects to bring itself into compliance with the NFIP is fruitless when the agency already possesses the power to suspend any community which is in violation. We certainly agree with the government that a community must be in compliance to remain in the program. However, that is not equivalent to saying we must force a community to comply by means of an injunction. While we can speculate upon the reasons the United States would like to have the court provide such injunctive relief, suffice it to say that we decline to make it available because the agency already had the power to suspend the parishes until they comply with the flood plain regulations.

(d) Availability of Subrogation

We perceive two inquiries to be dispositive of the United States' claim as to the availability of subrogation. First, we must consider Congress' intent in enacting the NFIP. Second, we must examine the validity of the regulations promulgated by the agency pursuant to Congress' directions.

We first had occasion to consider Congress' intent several years ago in *Drewett v. Aetna Casualty and Surety Co.*, 539 F.2d 496, 497 (5th Cir.1976). The plaintiff in *Drewett* argued that because the statue creating the NFIP anticipated premiums which were lower than the actuarial cost of insuring property in flood prone areas (the difference being subsidized by the federal government, *see* 42 U.S.C. §§ 4014 and 4015), it was inappropriate to apply general insurance law principles, which were originally developed to apply to profit seeking insurance companies.

We held Drewett's contention to be without merit. As we stated in the context of the NFIP as it was then operated:

> [T]he flood insurance program is administered with cooperation between the federal government and private insurance companies; the private companies carry some of the risk, although the federal government stands ready to reinsure and reimburse excessive losses. 42 U.S.C. § 4017, 4041-84. The Program also requires ongoing actuarial studies to help set the premiums to be charged, 42 U.S.C. § 4014. The eventual goal of the Program is to discourage building in flood prone areas by raising, over time, the

> premiums actually charged to equal the actuarial cost of flood insurance. *See* U.S. Code Cong. & Adm. News (1968) at 2969, reprinting House Report No. 1585, 90th Cong., 2d Sess. (1968).
>
> *In short, although the Program offers subsidized flood insurance, it is designed to operate much like any private insurance company and eventually to eliminate the subsidy. Because the Program's exposure to claims and its premiums are required to be estimated in accordance with standard insurance practices, and because private insurers carry part of the risk, it is clear that Congress did not intend to abrogate standard insurance law principles which affect such estimates and risks.* Nothing in the statue or regulations promulgated under it, *see* 24 C.F.R. Part 1909-18, requires otherwise.

Drewett at 498 (emphasis added).

We can perceive no reason the NFIP should be seen as operating differently now that the federal government has displaced private insurance companies. The actuarial studies required for the assessment of risk premiums remains the same. Indeed, the agency has long had the choice of operating the program privately or publicly. The reason the NFIP is now operated entirely by the government is because studies convencingly showed this would achieve greater economy.

As to the second inquiry - the validity of the agency regulations issued to implement the NFIP - it must be noted that the insurance policy used by the government is the same policy issued to property owners when private companies were employed as agents for the government

under the NFIP. When the government assumed the responsibilities formerly performed by the private companies, the agency published the insurance policy in the Code of Federal Regulations. It has been published there ever since. Nonetheless, defendants in these cases contend that the inclusion of the policy's subrogation clause is an unwarranted assumption of power by the agency outside the scope of congressional intent now that the United States operates the program. This, of course, is a very hard road for the defendants to travel since Congress delegated to the agency the responsibility for writing the regulations under which the NFIP would operate.

[8, 9] The standards by which federal regulations are to be judged were well stated in *New York Foreign Freight Forwarders and Brokers Association v. The Federal Maritime Commission*, 337 F.2d 289, 295 (2d Cir.1964), *cert. denied*, 390 U.S. 910, 914, 85 S.Ct. 893, 902, 13 L.Ed.2d 797, 800 (1965). The court observed that: (1) a regulation is presumptively valid, and one who attacks it has the burden of showing its invalidity; and (2) a regulation or administrative practice is ordinarily valid unless it is (a) unreasonable or inappropriate or (b) plainly inconsistent with the statute.

Thus, our scope of review of the agency issued regulations is limited. Such judicial restraint in the assessment of administrative regulations is rooted in a realistic view of the legislative process. Legislation cannot undertake to deal with every situation. Accordingly, Congress creates an administrative agency so that experts who are familiar with the task Congress has identified can address the problems in all their intricacies. The Supreme Court carefully explained the necessary and proper function of agency rulemaking in *American Trucking Associations*,

Inc. v. United States, 334 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953). In that case the Interstate Commerce Commission had issued rules prohibiting short-term or trip leasing by motor carriers. The court held that promulgation of the rules was within the Commission's power - despite the absence of specific reference to leasing practices in the Motor Carrier Act.

> All urge upon us the fact that nowhere in the Act is there an express delegation of power to control, regulate or effect leasing practices, and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" amoung the literal words of the statuory provisions. As a matter of principle, we might agree with appellant's contention if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. *National Broadcasting Company v. United States*, 319 U.S. 190, 219-20, 63 S.Ct. 997, 1010-11, 87 L.Ed. 1344; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 193-94, 61 S.Ct. 845, 852, 85 L.Ed. 1271. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their

> work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. *United States v. Pennsylvania Railroad Co.*, 323 U.S. 612, 65 S.Ct. 471, 89 L.Ed. 499.

American Trucking, 344 U.S. at 309-10, 73 S.Ct. at 314-15. Similar thoughts on the judicial restraint necessary when assessing agency regulations were expressed more recently by the Supreme Court in *American Union Transport, Inc. v. United States*, 257 F.2d 607, 612 (D.D.C.), *cert. denied*, 358 U.S. 828, 79 S.Ct. 46, 3 L.Ed.2d 67 (1958). The Court focused on "[t]he great complexity of our economy [which] induced Congress to place...the regulation[s] in specialized agencies with broad powers." The Supreme Court emphasized that we must be "slow to interfere with the conclusions of such agencies when [their regulations are] reconciliable with statutory directions."

[10] As to the task of reconciling regulations with their statutory authorization, courts give great deference to the interpretation given the statute by the officers or agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965). "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 91 L.Ed. 136, 145 (1946). *See also, Gray v. Powell*, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed 301 (1941); *Universal Battery Co. v. United States*, 281 U.S. 580, 583, 50 S.Ct. 422, 423, 74 L.Ed. 1051, 1054 (1930). "Particularly is this respect due when the administrative practice at stake 'involves a

contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *See Udall v. Tallman*, 380 U.S., at 16, 85 S.Ct. at 801, *citing Power Reactor Co. v. International Union of Electrical, Etc.*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 LEd.2d 924, 932 (1961).

[11] Defendants in these cases rely upon the surely correct proposition that the power of an agency when administering a federal statute and prescribing regulations is not the power to make law. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936). We believe the defendant's hornbook restatement of the law to be as accurate as it is inapposite. The inquiry before us is nothing more than the reasonableness of including subrogation as part of Congress' scheme to employ insurance principles as a cost saving mechanism in lieu of direct disaster relief appropriations. We would be disputing with the sophists if we doubted for a moment that:

> government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long continued action of the Executive Department - on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself - even when the validity of the practice is the subject of investigation.

See Udall v. Tallman, 380 U.S., at 17, 85 S.Ct. at 801-802, *citing United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73, 35 S.Ct. 309, 312-13, 59 L.Ed. 673, 681 (1915). We hold that the agency's adoption of the insurance policy formerly issued by private companies with its inclusion of a subrogation clause was within the framework contemplated by Congress and that the United States may pursue subrogation.

(e) Parish Liability to Suit and the Availability of a Common Law Remedy[8]

[12, 13] It is settled law that the parishes are not protected from suit by the eleventh amendment. As the Supreme Court observed in *County of Lincoln v. Luning*, 133 U.S. 766, 767, 10 S.Ct. 363, 363, 33 L.Ed. 766 (1889), "the Eleventh Amendment limits...jurisdiction only as to suits against a state." It has been the clear rule since the time of Chief Justice Marshall that "the Eleventh Amendment...is of necessity limited to those suits in which the state is a party on the record." *Osborn v. The Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857, 6 L.Ed. 204 (1824).

[14, 15] Since the elventh amendment constitutes no bar to a suit against the parishes, our next inquiry is whether Louisiana law allows such a suit. The doctrine of sovereign immunity has been abandoned in Louisiana. However, this does not mean a parish may be sued for any

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[8] We are aware, of course, that Louisiana is not a common law state. Nonetheless, some term is needed to identify the causes of action outside the NFIP and Louisiana insurance law. We use common law as such a descriptive moniker here.

cause. Parish liability is limited by the step-child of the old doctrine of sovereign immunity - the public duty doctrine. This doctrine, adopted in Louisiana, was well stated in *Stewart v. Schmieder,* 386 So.2d 1351, 1357 (La.1980).

> The rule of official responsibility, then, appears to be this: that if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an adequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. "The failure of a public officer to perform a public duty can constitute and indivdual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury be reason of its non-performance."

[16] The parishes' adoption of flood control measures and their responsibility for inspecting and maintaining defenses against the possibility of rising flood waters does no impel the automatic application of the bar of the public duty doctrine. Louisiana case law permits the conclusion that the parishes can be found liable after trial for the breach of what may be perceived to be at first glance as a public duty. *Bacile v. Parish of Jefferson,* 411 So.2d 1088 (La.App.1981); *Jones v. City of Baton Rouge,* 388 So.2d 737 (La.1980); *McCloud v. Parish of Jefferson,* 383 So.2d 477 (La.App.1980); *Broussard v. Parish of Jefferson,* 375 So.2d 722 (La.App.1979); *Lewis v. Fireman's Fund Ins. Co.,*

342 So.2d 244 (La.App.1977); *Jackson v. Parish of East Baton Rouge,* 331 So.2d 64, 65 (La.App.1076); *Contranchis v. Parish of Jefferson,* 299 So.2d 513 (La.App.1974); *Toppi v. Arbour,* 119 So.2d 621 (La.App.1960).

[17] Of course, it is a fundamental principle of insurance law that an insurer may not sue its own insured on the insurance policy. The law has recognized, however, that there may be causes of action by an insurer outside the policy, i.e. fraud. It is with understanding that we now consider the United States' claim as to the availability of common law remedies.

This circuit, along with others, has recognized that the government has a common law right to recoupment. *Jacquet v. Westerfield,* 569 F.2d 1339, 1345 (5th Cir.1978); *Woods v. United States,* 724 F.2d 1444, 1448 (9th Cir.1984); *United States v. Mead,* 426 F.2d 118, 124 (9th Cir.1970); *United States v. Silliman,* 167 F.2d 607, 610 (3d Cir.1948), *cert. denied,* 335 U.S. 825, 69 S.Ct. 48, 93 L.Ed. 379 (1948). However, an inextricable part of any decision as to the availability of a common law remedy must focus upon not only what remedies were intended by Congress in passing the NFIP, but also upon what remedies were foreclosed.

Thus, although in *Jacquet v. Westerfield* we held that the power to disqualify food stamp recipients on account of fraud was "inherent in the effective administration of such a program," at issue in *Jacquet* was a disqualification regulation. It is with this background that we said "[n]ot only is recoupment an appropriate administrative tool, but the government also has a common law right to recoup value fraudulently obtained from it.'

Jacquet at 1346.

In *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger,* 517 F.2d 329, 338 (5th Cir.1975), *cert. denied,* 425 U.S. 935, 96 S.Ct. 1665, 48 L.Ed.2d 176 (1976), we made the observation that "[t]he recoupment right does not always fit consistently and logically into the statutory system, but the alternative of no right to recoup produces even more severe incongruities." Thus, thought the general principle is, as we observed in *United States v. Bellard,* 674 F.2d 330, 333 (5th Cir.1982), that the courts are reluctant to find legislative enactments in derogation of the common law, this general rule cannot be viewed as a talisman; it must be tempered by the specifics of the program adopted by Congress. Accordingly, the availability of common law remedies is primarily a hunt for a species of congressional intent.

In our search of Congress' intent in enacting the NFIP we cannot escape the conclusion that it would be incongrous for the same body which did not contemplate express or implied contractual remedies against the defendants to have intended that the full panoply of common law actions remain available against the same defendants. It is not reasonable for us to conclude that Congress would have thought that the parishes would have voluntarily entered a program such as the NFIP - which involved many restriction upon land use - if they thought they were going to be subject to massive tort liabilities. It is unreasonable to argue, as the United States seemingly does, that the NFIP, a program designed to lessen the massive public outlay for federal disaster assistance, could be foisted in its entire cost onto the very people Congress was trying to protect from the prohibitive cost of flooding.

[18] Our decision that Congress did not intend to allow recovery from the defendants under the whole of common law torts, however, is not tantamount to saying that no action can lie against the parishes for the value of the property the parishes owned and insured under the NFIP. Moreover, since under standard insurance law principles the United States as an insurer cannot sue the parishes as its insureds under the NFIP policies, any action against the parishes concerning parish property insured under the NFIP is extremely limited. Although actions for fraud have traditionally been recognized at common law as a means of recovery from insureds by their insurers, we do not say at this early stage of litigation - prior to any real discovery having occured - that this will be the only non-subrogation action available by the United States against the parishes. It is only with this understanding of the very narrow nature of the causes of action available to the United States against the parishes for the value of the property owned and insured under the NFIP that we give the green light to the United States to pursue common law remedies against the parishes. Suffice it to say since none of the claims that may be articulated in subrogation actions against the parishes are available to the United States as an insurer, any action by the United States against the parishes for the value of the property which the parishes insured under the NFIP must not be in violation of the fundamental principle of insurance law that an insurer cannot sue its insured. To this limited extent expressed in our opinion, a common law remedy is available to the United States against the parishes.

V. Conclusion

By way of summation, we affirm the district court's

summary disposition of the United States' express contract and public nuisance claims. We further hold that the United States is not entitled to pusue an implied right of action or injunctive relief under the NFIP. However, subrogation, and any applicable causes of action at common law which do not violate fundamental insurance law principles for recovery of the value of the property the parishes owned and insured under the NFIP, remain available.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

JERRE S. WILLIAMS, Circuit Judge, concurring in part and dissenting in part:

I concur in all of my brother Brown's opinion for the Court in this case with the exception of IV(a) in which he conlcudes that the conditional grant in aid program did not create a contract between the federal government and the local governmental entities. This conclusion is contrary to a long line of established Supreme Court authority. The 1866 Supreme Court case of *McGee v. Mathis*, 71 U.S. (4 Wall.) 143, 155, 18 L.Ed 314 said: "It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State constituted a contract. All the elements of a contract met in the transaction - competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State." In our own controlling case on this issue, *United States v. Marion County School Dist.*, 625 F.2d 607 (5th Cir.1980), we quoted the *McGee* case at 609 n. 4. The *Marion County* case involved contractual assurances by the school district of compliance with

the prohibitions against racial discrimination in the Civil Rights Act in the operation of federally funded schools. At p. 609, our ruling was specific:

> As the Supreme Court has long recognized, the United States may attach conditions to a grant of federal assistance, the recipient of the grant is obligated to perform the conditions, and the United States has an inherent right to sue for enforcement of the recipient's obligation in court. *E.g., Rex Trailer Co. v. United States,* 350 U.S. 148, 151, 76 S.ct. 219, 221, 100 L.Ed. 149 (1956); *United States v. San Francisco,* 310 U.S. 16, 31, 60 S.Ct. 749, 757, 84 L.Ed. 1050 (1940); *Cotton v. United States,* 52 U.S. (11 How.) 229, 231, 13 L.Ed. 675 (1850); *Dugan v. United States,* 16 U.S. (3 Wheat.) 172, 181, 4 L.Ed. 362 (1818).

The same principle is stated in *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981), the case relied upon by the majority opinion for the contrary result. In the paragraph immediately preceding the paragraph quoted in the majority opinion, the Supreme Court gives the following recognition to the nature of a conditional grant as a contract:

> Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." *See Steward Machine Co. v. Davis,* 301 U.S. 548, 585-598, 57 S.Ct. 883, 890-896, 81 L.Ed.2d 1279 (1937); *Harris v. McRae,*

448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

The conditions the United States Government placed upon the grant in this case were clear and precise. Obviously the government knew that it was undertaking large financial obligations in supplying flood insurance to the citizens of the Parishes. It insisted upon conditions which would substantially cut down on that liability. The conditions which the Parishes were alleged to have breached were two in number. First, they failed to implement and enforce the specific land use and control requirements which they had obligated themselves to enforce. As a result, a number of buildings were built below the flood level elevation requirements which the Parishes promised to meet. Second, even more specifically, the Parishes failed to carry out unequivocal promises concerning the extablishment of adequate drainage systems involving pumps, canals, levies, and culverts. The United States further charges that the Parishes failed to keep drainage pumps in proper repair so that they would operate in situations involving flood emergencies.

These failures had to do with specific promises which the Parishes were required to make to be entitled to obtain for themselves and their citizens the flood insurance protections under the National Flood Control Act and the Flood Disaster Protection Act. I concede, of course, that the Court in *Pennhurst* did state that Congress must intend to impose clearly and unambiguously the conditions on the grant. Of course, the clearness and certainty come from the administrative requirements established under congressional authorization rather than requirements in the statute itself. Virtually all conditional grants by the

federal government occur through an administrative process that establishes the specific conditions and creates the contract under the general grant of authority from the Congress. Congress does not write the contract, nor does it sign it. The administrator writes the contract and signs it on behalf of the government.

It cannot be said in this case, in the words of *Pennhurst*, that a local governmental entity was "unaware of the conditions or [was] unable to ascertain what [was] expected of it." The conditions were clear and precise, and a contract was created under this conditional flood insurance program. A contract is the normal and usual outgrowth of a conditional grant of federal largesse, and there is no reason to treat this case as an exception.

Admittedly the more serious question is not whether a contract was created, but whether the local government bodies can be held liable for the consequential damages arising from their failures to carry out the contract provisions. These failures ultimately resulted in the federal government having to pay large flood insurance claims which, the federal government asserts, would not have arisen if the Parishes had carried out their contract obligations. Of course, upon trial the federal government would have to prove that the failure of the Parishes to carry out these contract obligations caused the damages. But there is absolutely nothing in the law of contracts, governmental or otherwise, giving the Parishes any privileged position with respect to liability for consequential damages for breach of contract. If the government can establish the link in causation, the Parishes are liable under the most elementary common-law principles. 5 Corbin, CONTRACTS §§ 997, 998.

The fact that federal monies were not paid directly to the Parishes but were paid through flood insurance claims to the citizens of the Parish does not alter the nature of the case. In *Grove City College v. Bell*, _____U.S._____, 104 S.Ct. 1211, 1216, 79 L.Ed.2d 516 (1984), the Supreme Court recognized that the College benefitted by a federal aid program even though all funds were paid directly to the students. The Court found that the College, therefore, was subject to the conditions attached to the receipt by the students of the federal financial assistance under the Civil Rights Act. The Court specifically recognized that the federal disbursements to the students benefitted the College through relieving it of financial burdens which it would otherwise have to bear in the absence of the federal assistance. Precisely the same considerations are applicable where it was to the obvious benefit of the Parish to obtain federal flood control insurance for its citizens. The contract existed, and its legal consideration from the point of view of the Parish was the interest of the Parish in obtaining for its citizens the subsidized federal flood control program.

Finally, I stress that I am in full agreement with the conclusion of the Court, in IV(c) of the opinion, that the government is not entitled to specific performance to enforce the contract in the future. The contract was without duration. The sanction for continuing violation of the contract by the Parishes was suspension from the program. 24 C.F.R. § 1909.24. The Parishes are not required by law to continue in the program. They can drop out at any time. *See Guardians Ass'n v. Civil Service Comm. of the City of New York*, _____U.S._____, 103 S.Ct. 3221, 3229, 77 L.Ed.2d 866 (1983). Thus there is no legal right to force them through a specific performance decree to continue to

abide by the contract. This conclusion, however, does not in any way affect the liability of the Parishes for damages to the United States Government while the contract has been in effect. The federal government is entitled to undertake to prove its case with respect to those damages. The district court erred in granting a partial summary judgment against such federal claims. I must dissent because this Court affirms the partial summary judgment which was erroneously granted on this issue.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 83-3557 & 83-3760

UNITED STATES OF AMERICA,
Plaintiff-Appellants,

versus

THE PARISH OF ST. BERNARD, ET AL.,
Defendants-Appellees.

* * * * * * * * * * * * *

No. 84-3082

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THE PARISH OF JEFFERSON, ET AL.,
Defendants-Appellants.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 4/8/85, 5 Cir. 198__, _____F.2d_____)

(June 10, 1985)

Before BROWN, WILLIAMS and GARWOOD, Circuit Judges.

PER CURIAM: of Defendants-Appellees Parish of Jefferson, et al.

(Appendix B continued)

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX C

U.S.A.	CIVIL ACTION
VS.	NO. 81-1808
PARISH OF ST. BERNARD, ET AL.	SECTION "H" consolidated with
U.S.A.	CIVIL ACTION NO.
VS.	81-1810
PARISH OF JEFFERSON, ET AL	

ORDER AND REASONS

Plaintiff, United States of America, filed two similar civil actions against various defendants. In Civil Action 81-1808 the defendants are the Parish of St. Bernard, the Police Jury of the Parish of St. Bernard, the Lake Borgne Basin Levee District, the State of Louisiania, and various home builders and surveyors. In Civil Action 81-1810, the defendants are the Parish of Jefferson and its insurer, Fireman's Fund Insurance Co., Jefferson Parish Council, (Fireman's Fund also insures the Council), the Lafourche Basin, Pontchartrain, Jefferson and West Jefferson Levee Districts, and various homebuilders, surveyors, and a design engineer. Travelers Inusrance Co. is also joined as a defendant in the Jefferson Parish suit, as insurer of one of the builders, Regent Development Corp. The two suits have been consolidated.

Jurisdiction over suits commenced by the United States is conferred by 28 U.S.C. 1345.

The complaints allege that the two Louisiana parishes and their respective governing bodies chose to participate in the National Flood Insurance Program, pur-

suant to the National Flood Insurance Act of 1968, 42 U.S.C. §4001 *et seq.*Thousands of residents in each parish thus became eligible for and purchased federally subsidized flood insurance coverage. On May 3, 1978, and again on April 12 and 13, 1980, and on other prior occasions covered by the flood insurance program, substantial flooding occured which caused damages to insured property in both parishes. The United States, claiming that it paid more than $17,000,000 in St. Bernard Parish and more than $76,000,000 in Jefferson Parish in flood claims and adjusters' fees, seeks a variety of relief, including damages, specific performance, and injunctive relief.

The United States seeks to recover from the various defendants upon an array of legal theories:

(a) the parishes and their governing bodies, by electing to enter the National Flood Insurance Program, contracted to adopt and enforce land use and control measures consistent with the requirements of the National Flood Insurance Program and failed to do so, thus breaching the contracts;

(b) by certain willful and negligent acts and omissions, all defendants are liable in tort for the resulting flood damage; and

(c) the activities of defendants have caused recurrent flooding, constituting a public nuisance under federal common law, which plaintiff seeks to abate.

The National Flood Insurance Program was initiated

with the passage of the National Flood Insurance Act of 1968, which made available federally subsidized flood insurance to those communities willing to participate in the program. Legislation in 1973 provided increased incentives to participate in the flood insurance program, including denial of federal financial assistance in flood-prone areas which did not participate in the flood insurance program and, in participating communities, denial of federally-related financing of construction or acquisition of property not covered by flood insurance. 42 U.S.C. §4106(a)(b).

The findings and declaration of purpose of the National Flood Insurance Act reveal several areas of Congressional concern: to relieve the personal hardships and economic distress caused by flooding without increasing the burden of disaster relief programs, to share the risk of flood losses, to foster a unified national program for flood plain management, to guide future development away from flood prone areas, and to encourage continuing studies of flood hazards. 42 U.S.C. §4001, 4002.

The Act provides for jurisdiction in the United States district courts of any action to contest the denial of a claim for flood insurance benefits. 42 U.S.C. §4072. The Act also provides that, as a condition for eligibility for government-supported flood insurance, communities shall adopt sound land use policies designed to minimize flood damage. 42 U.S.C. §4072. The Act also provides that, as a condition for eligibility for government-supported flood insurance, communities shall adopt sound land use policies designed to minimize flood damage. 42 U.S.C. §4022, 4102. Regulations provide in detail the land use measures to be adopted. Failure to adopt such measures may result in suspension of the community from the flood insurance pro-

gram. 44 C.F.R. 59.24. The result of such suspension would be inability of property owners in those parishes to obtain flood insurance or to obtain financing from institutions regulated by or controlled by the federal government. Neither St. Bernard nor Jefferson Parish has been suspended from eligibility in the program.

The cases were referred to a magistrate (28 U.S.C. 636(b)) for consideration of various motions to dismiss or for summary judgment. The magistrate filed a "Finding and Recommendation", to which various objections were filed, with supporting memoranda. The court heard oral argument thereon, and for the oral reasons announced in open court, supplemented by these written reasons, the floowing order was entered:

The Motions to Dismiss or for Summary Judgment filed on behalf of various defendants, seeking to dismiss the contract claim were granted insofar as the complaint seeks specific performance.

The motions of various defendants to dismiss or for summary judgment insofar as the complaint seeks recovery in tort were denied.

The motions of various defendants to dismiss or for summary judgment insofar as the complaint seeks to abate a "public nusiance"were granted.[1]

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[1] Three other motions were decided but are not dealt with herein; the oral reasons being complete: the motion to dismiss insofar as a third party claim is sought to be asserted against the Corps of Engineers, the motion of Fireman's Fund Ins. Co. to dismiss or for summary judgment, and the motion of defendant Krebs for summary judgment.

BREACH OF CONTRACT

The United States seeks damages and specific performance under a breach of contract theory from Jefferson Parish, St. Bernard Parish and their respective governing bodies. It is undisputed that there is no written contract between the parties by virtue of the parishes' participation in the NFIP and, if so, whether the government has a remedy for its breach.

The United States relies upon a number of documents in support of its contract claim in its opposition to the motions for summary judgment. Under the National Flood Insurance Act, the adoption of adequate land use and control measures by local governments is a condition precedent to entry into the flood insurance program, 42 U.S.C. 4022. The governing body of each defendant parish passed a resolution indicating its intent to participate in the NFIP. Thereafter, the parishes were told that various land use and control measures were required by regulations promulgated under the Act. The parish governing bodies in turn adopted ordinances to comply with the regulations. Passage of these resolutions and ordinances, together with the government's subsidization of the flood insurance program, is sufficient evidence to conlcude that an implied contract exists between the parties and that the parishes were aware of and understood their obligations under the contract.

Also at issue is what remedies are available for breach of contract by the parishes. We emphasize that our analysis is based on a cause of action sounding in contract and not a cause of action arising under the National Flood

Insurance Act. For this reason a *Cort v. Ash*[2] analysis is inapplicable. Moreover, we construe *Cort v. Ash* as applicable only to a determination of whether private parties (not the United States) have an implied right of action under a statute.

It has frequently been held that the United States may employ common law remedies to enforce conditions attached to the dispersal of federal benefits. See *Penhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), *United States v. San Francisco*, 310 U.S. 16 (1940), and particularly the following from *United States v. Marion County School District*, 625 F.2d 607, 609 (5th Cir. 1980):

> It is settled law that the United States has authority to fix the terms and conditions upon which its money allotments to state and other governmental entities should be disbursed. *Lau v. Nichols*, 414 U.S. 569, 94 S.Ct. 786, 789, 39 L.Ed.2d 1 (1974); *King v. Smith*, 392 U.S. 309, 333, 88 S.Ct. 2128, 2141, 20 L.Ed2d 118 (1968); *Ivanhoe Irrigation District v. McCracken*, 257 U.S. 275, 295, 78 S.Ct. 1174, 1185, 2 L.Ed.2d 1313 (1958); *Oklahoma v. Civil Service Commission*, 230 U.S. 127, 143, 67 S.Ct. 544, 553, 91 L.Ed. 794 (1947). As the Supreme Court has long recognized, the United States may attach conditions to a grant of federal assistance, the recipient of the grant is obligated to perform the conditions, and the United States has an inherent right to sue for enforcement of the recipient's obligation in court. *E.g., Rex Trailer Co. v. United States*, 350 U.S. 148, 151, 76 S.Ct. 219, 221,

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[2] 422 U.S. 66 (1975)

100 L.Ed 149 (1956); *United States v. San Francisco,* 210 U.S. 16, 31, 60 S.Ct. 749, 757, 94 L.Ed. 1050 (1940); *Cotton v. United States,* 52 U.S. (11 How.) 229, 231, 13 L.Ed. 375 (1850); *Dugan v. United States,* 16 U.S. (8 Wheat.) 172, 181, 4 L.Ed. 362 (1818).

Congress can of course nullify the government's right to sue to enforce a contract under the federal common law, but, "as the Supreme Court has repeatedly emphasized, courts are entitled to conclude that Congress has done so only if the evidence of Congress' intent is extremely, even unmistakably, clear. Id at 611.

However, if the United States imposes a condition upon federal funds, it must do so unambiguously. *Penhurst State School and Hospital v. Halderman,* supra. Here the documents show that the conditions imposed on the parishes were unambiguous, and the parishes did not communicate to the government a lack of understanding of their obligations under the Act.

The United States seeks to enforce the conditions of the NFIP through both specific performance and reimbursement of the funds expended to satisfy flood insurance claims made under policies issued to residents of Jefferson and St. Bernard Parish. These two remedies are distinct and are discussed separately.

No case has been called to our attention wherein the United States was granted the right of reimbursement as a remedy for breach of contract. The defendant parishes were not the direct recipients of federal funds; the government seeks reimbursement from the parishes for funds paid

to individual residents of the parishes, as damages for breach of contract. We conclude that it was not Congress' intent to permit reimbursement from the parishes under such circumstances. Neither Congress nor the parish governing bodies foresaw that there would be such an extreme remedy for either a negligent or intentional breach of the contract. Certainly had they foreseen that they might be liable for flood losses and expenses related thereto, the parishes would never have decided to participate in the program. The lack of foreseeability is supported by the documents submitted by the United States, which evidence no indication that the government would seek to enforce compliance with the NFIP regulations by means of reimbursement of monies expended to satisfy flood insurance claims. For these reasons, the government's damage claims for reimbursement for funds expended on flood insurance claims based on breach of contract are dismissed.

However, we conclude that the United States has stated a cause of action for specific performance against the parishes and their governing bodies. The government's right to seek specific performance to enforce contractual obligations has been consistently recognized. Unlike the instant case, in which the citizens of the parishes received the benefit of the NFIP, *United States v. San Francisco, supra* and *United States v. Marion County School District,* both involved specific performance against local agencies which were the direct recipients of federal benefits of obligations attached to their receipt. That distinction, however, is not significant. We conclude that Congress did not intend that the government should be powerless to compel the parishes and their governing bodies to perform obligations clearly undertaken by them as a condition precedent to the issuing of flood insurance policies to the citizens of the parishes.

We do not at this time decide what form the remedy of specific performance may take. Such relief, however, is not precluded by the Tenth Amendment. The parish governing bodies voluntarily decided to participate in this program, albeit that the United States used certain financial incentives to make the program more attractive to local communities. When local governing bodies voluntarily commit themselves to participation in a federal program, they cannot urge that the Tenth Amendment prohibits the United States from compelling them to satisfy their obligations under the contract. *See Texas Landowners Rights Association v. Harris*, 453 F.Supp. 1025 (D.D.C. 1978). We conclude that the plaintiff has stated a cause of action for specific performance of the contracts between it and the two parishes.

TORT CLAIM

The second claim urged by the government is premised on the theory that it has a right of subrogation, either by operation of law or conventionally, to any claim which an insured homeowner may have had against the various defendants with respect to the flood damages sustained by the homeowner. The insurance policies all contained the following subrogation clause:

> "In the event of any payment under this policy, the Insurer shall be subrogated to all the Insured's rights of recovery therefor against any party, and the Insurer may require from the Insured an assignment of all rights of recovery against any party for loss to the extent that payment therefor is made by the Insurer." 44 CPR §61.13, App. (A)(1), General Conditions, "T"; App. A(2), General Conditions, "U."

It is well settled under Louisiana law that a homeowner may assert a cause of action against any party, public or private, allegedly responsible for damage due to flooding. *See, e.g., Eschete v. City of New Orleans,* 258 La. 134, 245 So.2d 383 (La. 1971); *North Forest Homeowners' Assoc. v. Homecraft Corp.,* 407 So.2d 450 (La. App. 1st Cir. 1981); *McCloud v. Parish of Jefferson,* 383 So.2d 477 (La. App. 4th Cir. 1980). *See also Stewart v. Schmeider,* 386 So.2d 1351 (La. 1980); *Mobley v. Rego,* 412 So.2d 1143 (La. App. 2d Cir. 1982). Additionally, there is no question that a determination as to whether the United States is subrogated to that right of the homeowner is an issue controlled by federal law, because, as the Fifth Circuit held in *West v. Harris,* 573 F.2d 878 (5th Cir. 1978), federal common law, in the absence of a Congressional statute, must govern all rights and obligations under NFIP policies. Subrogation is unquestionably one of those rights and obligations.

With regard to the tort claim, the sole issues in dispute are: (A) is there a federal common law right to subrogation?; (B) if so, has that right been preempted by the NFIP?; and (C) are any tort claims prescribed?

Defendants' assertions notwithstanding, the right of subrogation is well established in federal jurisprudence. *See Continental Casualty Co. v. Canadian Ins. Co.,* 605 F.2d 1340 (5th Cir. 1979), *cert. denied,* 445 U.S. 929 (1980); *United States v. Bender Welding & Machine Co.,* 558 F.2d 761 (5th Cir. 1977); *Department of Revenue of the State of New Mexico v. United States,* 408 F.2d 574 (10th Cir. 1969). Defendants rely upon *United States v. Standard Oil Co.,* 332 U.S. 301 (1947), in which the Supreme Court held that in the absence of legislation providing a right of

recovery, the government could not recover from a tortfeasor the amounts expended for an injured soldier's hospitalization and for his compensation during disabiliy. But in *Bender, supra*, at 765, the Fifth Circuit clearly explained that *Standard Oil* was not controlling precedent on issues dealing with subrogation: "*United States v. Standard Oil of California*, 322 U.S. 301, 67 S.Ct. 1604, 81 L.Ed. 2067 (1947), was not a subrogation case, and reliance on the denial of recovery to the Government in that case is misplaced."

Having determined that there is a generally recognized common law right to subrogation, we also conclude that the NFIP has not preempted the application of those federal common law principles. The Supreme Court in *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981), stated that the key to this decision "[is] whether the legislative scheme '[speaks] directly to the question'...not whether Congress [has] affirmatively proscribed the use of federal common law." In the NFIP, Congress has not affirmatively proscribed the use of federal common law for issues concerning subrogation; neither has it spoken directly to the question. In fact, far from preempting the principles of subrogation, specific provisions of the NFIP appear to support its applicability. In particular, 42 U.S.C. §4013 provides that the Secretary of Housing of Urban Development[3] "shall...provide by regulation for general terms and conditions of insurability which shall be applicable to properties eligible for flood insurance coverage."

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[3] All duties imposed by this section on the Secretary of Housing and Urban Development have been transferred to the Director of the Federal Emergency Management Agency by § 202 of Reorganization Plan No. 3 of 1978, set out in Appendix II of Title 5 of the United States Code.

Following the mandate of this section, the Secretary placed the subrogation clause quoted above in the "Standard Flood Insurance Policy" forms, which clause is simply one of those terms or conditions of insurability. *See* 44 C.F.R. §61.13, App. A(1), General Conditions, "T"; App. A(2), General Conditions, "U". Also, several sections of the NFIP, including 42 U.S.C. §§ 4011, 4017, 4046 and 4051-6, show that Congress contemplated that the Secretary would encourage and arrange for the involvement of private insurers; it is undisputable that subrogation clauses are a common part of insurance policies issues by private insurers.

Defendants' position that preemption has occurred is based on *Till v. Unifirst S. & L. Assn.*, 653 F.2d 152 (5th Cir. 1981). The *Till* court held that the NFIP did not imply a right of action for monetary damages on behalf of a property owner-borrower against a federally insured savings and loan association which allegedly failed to follow certain guidelines under the Act. The court reasoned that, since the "*Cort v. Ash* test" for implied rights of action was becoming increasingly stringent and since may administrative remedies were set up to handle "wayward" savings and loans, administrative remedies should be exclusive:

> Once again we are asked to find from the language and history of a federal statute, an implied cause of action not explicitly provided for by Congress. The standards which such a cause of action must meet before it may be implied have become increasingly more stringent.
>
> * * *

> In this case, the Federal Home Loan Bank Board (FHLBB) has the authority to issue cease and desist orders against appellees' officers, to terminate unsafe or unsound practices, to impose administrative remedies, including monetary penalties, and to require affirmative action to prevent or correct violations. Existence of this administrative scheme of enforcement is strong evidence that Congress intended the administrative remedy to be exclusive.

Id. at 157 and 160.

The *Till* decision is notable only in that it is one of the few cases discussing substantive rights under the NFIP; in no way does it deal with the present issue. *Till* did not involve subrogation. More importantly, the issue in *Till* was whether a right of action should be implied from a statute when that right did not otherwise exist. *In the instant situation, the Cort v. Ash* analysis is not relevant, since the question is not whether a right of subrogation can be implied form the statute, but rather, whether the statute preempts the well established common law principle of subrogation. Retaining a right of action under the *City of Milwaukee* test, used in this case is far less stringent than establishing a right of action under *Cort v. Ash*, used in *Till*.

Another issue related to the tort claim is the contention by several defendants that the government's claim has prescribed. We adopt the magistrate's handling of that issue:

> [T]he United States asserts that if it was assigned a claim before the state statute of limitations expired, then the United

States was thereafter subject to the federal statute of limitations for negligence actions, which is three years. 28 U.S.C. §2415(b). The United States claims that if it paid a claim within one year of the date flooding occurred, it then became subject to the three year federal statute of limitations for negligence actions and that this action was timely filed.

It is well settled that asignment to the United States will not revive a claim which has already been barred by a state statute. Guaranty Trust Co. v. United States, 304 U.S. 126, 141-142; 58 S.Ct. 758, 793; 82 L.Ed.2d 1224 (1938). However, in the case of an assignment before the state statute of limitations has run, the case will not be barred until the federal statute has run. *United States v. Summerlin,* 310 U.S. 414, 60 S.Ct. 1019; 84 L.Ed. 1283 (1940); *United States v. Nashville Chattanooga, St. Louis Ry Co.,* 118 U.S. 120, 125; 6 S.Ct. 1006, 1008; 30 L.Ed. 81 (1886). Therefore, the Court must consider whether the claims assigned to the United States were barred by a state statute before their assignment and, if not, whether the federal statute had run before this action was filed.

The applicable state limitations period for flood damages is one year. *Young v. International Paper Company,* 155 So. 231, 179 La. 803 (La. 1934). Assignment of the claims for flood damage occurred at the time the United States paid the claims of its insureds. *State Farm Fire and Casualty Co. v. Sentry Indemnity,* 346 So.2d 1331 (3rd Cir. La. App. 1977). Because the floods out of which the claims of the United States arose occurred at

> various times and flood damage claims were paid at various times, it is impossible to determine on the present record whether all the United States claims are prescribed.
>
> However, it can be determined that all claim derived from flooding which occurred more than four years prior to the filing of the compalaint are prescribed, since the relevant state statute of limitations, one year, as well as the relevant federal limitations period, three years, would have expired. This action was filed May 1, 1981.

Therefore, any tort claim derived from flooding which occurred prior to May 1, 1977, is prescribed. Certain other claims may be prescribed, but this can be determined only after further facts are developed, and not at this stage of the case.

PUBLIC NUISANCE CLAIM

We dismiss the final claim upon which the government seeks relief, based upon its allegation that all defendants have caused recurrent flooding, constituting a public nuisance under federal common law. We do so upon the fundamental ground that the United States lacks "standing" to abate the alleged nuisance, conceding *arguendo* that under federal common law or state law the aggrieved property owners or the state could abate the nuisance.

An inquiry concerning a plaintiff's standing to sue centers around the question of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). When the United States "stands" as the party-

plaintiff, a federal court will consider the merits of the action if the government has a sufficient interest at stake. *See United States v. New Orleans Pac. Ry. Co.*, 248 U.S. 507 (1919); *United States v. Waller*, 243 U.S. 452 (1917). The types of interest which have been held sufficient by the Supreme Court were recently discussed by the First Circuit:

> We recognize that the United States may sometimes sue without statutory authority or a pecuniary interest, *see SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 60 S.Ct. 1044, 84 L.Ed. 1293 (1940); *United States v. New Orleans Pac. Ry.*, 248 U.S. 507, 518, 39 S.Ct. 175, 63 L.Ed. 888 (1919); *In re Debs*, 158 U.S. 564, 586, 15 S.Ct. 900, 39 L.Ed. 1092 (1895). But in this case there is no national issue of great moment or urgency, no fraud on the United States, and no fiduciary duty owed to an individual such as would justify suit simply under the aegis of constitutional grant and congressional exercise of power.

Ruotolo v. Ruotolo, 572 F.2d 336, 339 (1st Cir. 1978). *See also* Comment, "Protecting the Public Interest: Nonstatutory Suits by the United States", 89 Yale L.J. 118 (1978).

Although the precise issue of the United States' standing to bring suit to abate a public nuisance causing intra-state flooding has not been litigated, several courts have discussed a somewhat analogous situation in the context of a nuisance action for pollution control. *See United States ex rel. Scott v. United States Steel Corp.*, 356 F.Supp. 556 (N.S. Ill. 1973); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F.Supp. 145 (D. Vt. 1972); *United States v. Lindsay*, 357 F.Supp. 784 (E.D.N.Y. 1973). A thorough

discussion of the issue is contained in the *United States Steel* decision:

> Apparently the United States Supreme Court has never explicitly held that the government of the United States has standing to abate a common law nuisance on behalf of its residents. However, in *New York v. State of New Jersey, et al.*, 256 U.S. 296, 41 S.Ct. 492, 65 L.Ed. 937 (1921) the Supreme Court stated that the Federal government had the undoubted right to intervene to protect the navigable waters from pollution (256 U.S. at p. 308, 41 S.Ct. 492). *See also Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967). The Federal government clearly has a proprietary interest in the navigable waters of Lake Michigan which is bounded by four states. It also has an interest in establishing a "uniform rule of decision" by enforcing a Federal common law. Cf. State of Illinois v. City of Milwaukee, et al., 406 U.S. at p. 105 n. 6, 92 S.Ct. 1385. Hence, since the Federal government could intervene in this litigation, we find and conclude that it has a sufficient independent interest to file it. *Acc., United States of America v. Ira S. Bushey & Sons, Inc., et al.*, 346 F.Supp. 145 (D.Vt.1972); *United States of America v. Reserve Mining Co., et al. (D.Minn. Nov. 30, 1972).*

356 F.Supp. at 558.

Unquestionably, that court's decision hinged on the fact that the pollution involved a navigable body of water bounded by several states. Other public nuisance "pollution" cases, while not specifically mentioning standing,

have also stressed this interstate connexity requirement in finding that the United States could not assert a cause of action of public nuisance when only intrastate effects were alleged in the pleadings.[4] *See, e.g., Reserve Min. Co. v. EPA,* 514 F.2d 492 (8th Cir. 1975). As the Eighth Circuit stated in *Reserve Min. Co.:*

> We reject the federal common law of nuisance as a basis for relief. As forumulated in *Illinois v. City of Milwaukee,* 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972), and *Texas v. Pankey,* 441 F.2d 236 (10th Cir. 1971), federal nuisance law contemplates, at a minimum, interstate pollution of air or water. The United States, while invoking this doctrine, alleges only that Reserve's discharge "significantly endangers the health of all those persons living in the vicinity of the defendant's taconite ore processing operations."

Id. at 520-1.

We conclude that in the present case, the United States does not have standing to assert a public nuisance claim, since no national interest is at stake. The flooding at issue occurred totally within the borders of Louisiana. Notwithstanding that the flooding could indirectly affect taxpayers throughout the United States, because the government must pay NFIP insureds, no direct interstate interest is implicated.

The government relies for "standing" on *United*

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[4] Several courts have held that the pollution need not be literally interstate if pollution has occurred in navigable waterways. *See, e.g., United States v. Solvents Recovery Serv., Etc.,* 496 F.Supp. 1127 (D. Conn. 1980); *United States v. Ira S. Bushey, supra.*

States v. Ray, 423 F.2d 16 (5th Cir. 1970), in which the United States brought an action to enjoin private construction atop coral reefs on the outer continental shelf. The private developers were plainning to creat independent "nations" on the reefs, claiming that the reefs were subject to colonization by them since they had discovered the reefs. Not surprisingly, the Fifth Circuit determined that the United States had the "exclusive right for purposes of exploration and exploitation of the reefs" since the reefs belonged to the public as a whole, *id.* at 22; and the government had an "important interest to protect in preventing the establishment of a new sovereign nation within four and one-half miles of the Florida Coast," *id.* at 23.f

The facts in *Ray*, quite unlike those in the instant case, present one of the strongest situations imaginable for standing by the United States. In *Ray*, because the object of the threatened harm was a "public thing" beyond state territorial waters and controlled by the United States government for the good of all citizens, the United States was *the* proper party to prevent exploitation of the reefs by private developers. This case, by contrast, involves a purely local matter, an action for which could be brought against the alleged tortfeasors by any threatened private citizen and/or state or local governmental entity; the continual flooding endangers lands under specific, private ownership.

Although we conclude that the government lacks standing, we nevertheless discuss the related and intertwined issue of whether under federal common law there exists a right to abate the type of public nuisance alleged in the complaint.

The United States Supreme Court has recently outlined three situations in which federal common law exists:

> Rather, absent some congressional authorization to forumulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system doesn not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630, 641 (1981).

Obviously, there is no contention here that this is an admiralty case, but the government does attempt to justify the application of federal common law under both the "interstate" and the "rights and obligations of the United States" areas.

It is difficult to follow the argument that the instant case involves an "interstate" dispute "implicating the conflicting rights of the States." *Id.* All of the alleged wrongful acts, and the consequences resulting therefrom, occurred within the borders of Louisiana. The government asserts that the economic effects of the flooding are interstate in nature, because taxpayers throughout the country may be

required to subsidize losses in the NFIP. According to the government's analysis, federal common law would apply to any circumstance in which the United States has a substantial monetary interest.

Such an expansive interpretation of federal common law clearly conflicts directly with the Supreme Court's teaching that the instances of federal common law must be "few and restricted." *Wheeldin v. Wheeler,* 373 U.S. 647, 651 (1963). Examples of the types of "interstate disputes" appropriate for federal common law are interstate pollution, *Illinois v. Milwaukee,* 406 U.S. 91 (1972), and interstate water or boundary disputes, *Hinderlider v. LaPlata River & Cherry Ditch Co.,* 304 U.S. 92 (1938). Certainly, this case is not in the same category.

The government also contends that federal common law is justified on the basis of the "narrow [area]...concerned with the rights and obligations of the United States." *Texas Industries, Inc. v. Radcliff Materials, supra.* Two of the leading cases establishing such common law are *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943) (rights and duties of United States on commercial paper it issues pursuant to federal law), and *United States v. Little Lake Misere Land Co.,* 412 U.S. 580 (1973) (because land acquisition was one arising from and bearing heavily upon federal regulatory program, federal law would govern). Both of these cases involved the rights and obligations of the United States in proprietary transactions in which uniformity was a necessity. While this category of federal common law is not limited to proprietary transactions to which the United States government is a party, there must at least be a strong federal interest coupled with the need for uniformity. *See, e.g. Textile Workers Union v. Lincoln*

Mills of Ala., 353 U.S. 448 (1957).

The government points to two cases which, relying on the *Clearfield* analysis, have determined that federal common law governs disputes concerning coverage of NFIP policies. *See West v. Harris*, 573 F.2d 873 (5th Cir. 1978); *Beverly v. Macy*, 702 F.2d 931 (11th Cir. 1983). The *West* court held:

> In sum, federal law controls disputes over the coverage of insurance policies issued pursuant to the National Flood Insurance Act of 1968 regardless of whether the district court exercises jurisdiction under 42 U.S.C.A. § 4053 or under 28 U.S.C.A. § 1332. Congress has undertaken to establish a comprehensive flood insurance program under the control of the Department of HUD to achieve policies national in scope, and the interest in uniformity of decisions compels the application of federal law. As a result, a prevailing plaintiff is not entitled to recover the penalty and attorney's fees provided by Louisiana. Nothing in the decisional law of this circuit or in the provisions of the insurance policy points to a contrary conclusion.

573 F.2d at 881-2.

The instant situation does not fit into the "narrow" *Clearfield* area. There is simply no strong federal interest in isolated flooding. The government is correct that interstate ramifications are not a prerequisite for application of *Clearfield* common law, but such a factor is a consideration going to the degree of interest. As the *Clearfield* Court itself noted:

> The issuance of commericial paper by

> the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

318 U.S. at 367.

In *Clearfield*, the Court realized that thousands of transactions would occur daily, often involving more than one state in the same transaction.

More importantly, the federal common law of nuisance which the government attempts to assert in this case is not closely related to the purported statutory interest, as was the situation in *Clearfield* and its progeny. In those cases, uniformity was required because they involved issues "bearing heavily upon a federal...program." *United States v. Little Lake Misere Land Co., supra*, at 592. For example, in *West v. Harris, supra*, the Fifth Circuit determined that Congress, through the NFIP, had established a "comprehensive flood insurance program...to achieve policies national in scope"; thus, all issues concerning rights and obligations pursuant to an NFIP policy should be determined by a uniform body of law. We decline to apply that to the present case, involving only local flooding.

Finally, the *Clearfield* cases are distinguishable in that, in those cases, if the federal common law sought to be asserted was not accepted as the applicable law, then the

United States had no other method by which to insure that its interests were protected. In this case, the United States is able to force compliance with the NFIP by injunctive relief and, in the event flooding has occurred due to the negligence of contractors or municipalities, by a suit in tort through subrogation to the homeowners' rights.

A finding in this case that the federal common law of nuisance not be applied is compatible with the principle that federal common law is to be invoked "restrictively". *City of Milwaukee v. Illinois and Michigan, supra,* at 313.

This result also draws support from those cases discussing federal common law with regard to pollution. As stated previously, several courts have determined that the nuisance action for pollution could only be asserted if interstate effects were alleged. *See, e.g., Reserve Min. Co. v. Epa, supra; Committee for Jones Falls Sewage System v. Train,* 539 F.2d 1006 (4th Cir. 1976).

July 8, 1983

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 29 1985
JOSEPH F. SPANIOL, JR
CLERK

NO. 85-332

In the Supreme Court of the United States

OCTOBER TERM 1985

THE PARISH OF ST. BERNARD, ET AL,
Defendants-Petitioners,
VS.
UNITED STATES OF AMERICA,
Plaintiffs-Respondents.

PETITION OF THE PARISH OF JEFFERSON AND JEFFERSON PARISH COUNCIL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (CONSOLIDATED CASES NOS 83-3557, 83-3760 and 84-3082)

VOLUME 2

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APPENDIX D

42 U.S.C. §4012(c)

Availability of insurance in States or areas evidencing positive interest in securing insurance and assuring adoption of adequate land use and control measures

(c) The Secretary shall make flood insurance available in only those States or areas (or subdivisions thereof) which he has determined have—

(1) evidenced a postive interest in securing flood insurance coverage under the flood insurance program, and

2) given satisfactory assurance that by December 31, 1971, adequate land use and control measures will have been adopted for the State or area (or subdivision) which are consistent with the comprehensive criteria for land management and use developed under section 4102 of this title, and that the application and enforcement of such measures will commence as soon as technical information on floodways and on controlling flood elevations is available.

42 U.S.C. §4013(a)

Nature and limitation of insurance coverage; regulations

(a) The Secretary shall from time to time, after consultation with the advisory committee authorized under section 4025 of this title, appropriate representatives of the pool formed or otherwise created under section 4051 of this title, and appropriate representatives of the insurance

authorities of the respective States, provide by regulation for general terms and conditions of insurability which shall be applicable to properties eligible for flood insurance coverage under section 4012 of this title, including

(1) the types, classes, and locations of any such properties which shall be eligible for flood insurance;

(2) the nature and limits of loss or damage in any areas (or subdivisions thereof) which may be covered by such insurance;

(3) the classification, limitation, and rejection of any risks which may be advisable;

(4) appropriate minimum premiums;

(5) appropriate loss-deductibles; and

(6) any other terms and conditions relating to insurance coverage or exclusion which may be necessary to carry out the purposes of this chapter.

42 U.S.C. 406 (a)(b)

Disaster mitigation requirements; nonparticipation in flood insurance program.

Prohibition against Federal approval of financial assistance

(a) No Federal officer or agency shall approve any financial assistance for acquisition or construction purposes on and after July 1, 1975, for use in any area that has been identified by the Secretary as an area having special flood hazards unless the community in which such area is situated is then participating in the national flood insurance program.

Federal regulations against loans by financial institutions; pre-March 1, 1976 residences not affected; small business concerns; improvements under $5,000; nonresidential farm improvement

(b) Each Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions shall by regulation prohibit such institutions on and after July 1, 1975, from making, increasing, extending, or renewing any loan secured by improved real estate or mobile home located or to be located in an area that has been identified by the Secretary as an area having special flood hazards, unless the community in which such area is situated is then participating in the national flood insurance program, except that the prohibition contained in this sentence shall not apply to (1) any loan made to finance the acquisition of a residential dwelling occupied as a residence prior to March 1, 1976, or one year following identification of the area within which such dwelling is located as an area containing special flood hazards, whichever is later, or made to extend, renew, or increase the financing or refinancing in connection with such a dwelling, (2) any loan, which does not exceed an amount prescribed by the Secretary, to finance the acquisition of a building or structure completed and occupied by a small business concern, as defined by the Secretary, prior to January 1, 1976, (3) any loan or loans, which in the aggregate do not exceed $5,000, to finance improvements to or rehabilitation of a building or structure occupied as a residence prior to January1, 1976, or (4) any loan or loans, which in the aggregate do not exceed an amount prescribed by the Secretary, to finance nonresidential additions or improvements to be used solely for agricultural purposes on a farm.

(a) Prohibition against Federal approval of financial assistance

No Federal officer or agency shall approve any financial assistance for acquisition or construction purposes on and after July 1, 1975, for use in any area that has been identified by the Director as an area having special flood hazards unless the community in which such area is situated is then participating in the national flood insurance program.

(b) Notification of purchaser or lessee of property in flood hazards area of availability of Federal disaster relief assistance in the event of a flood disaster.

In addition to the requirements of section 4104a of this title, each Federal instrumentality described in such section shall by regulation require the institutions described in such section to notify (as a condition of making, increasing, extending, or renewing any loan secured by property described in such section) the purchaser or lessee of such property of whether, in the event of a disaster caused by flood to such property, Federal disaster relief assistance will be available to such property.

(As amended Pub.L. 95-128, Title VII, § 703(a), Oct. 12, 1977, 91 Stat. 1144; Pub.L. 98-181, Title IV, § 451(e)(1), Nov. 30, 1983, 97 Stat. 1229.)

44 C.F.R. §61.13 and appendix thereto

§61.13 Standard Flood Insurance Policy.

(a) *Incorporation of forms.* Each of the Standard Flood Insurance Policy forms included in Appendix "A"

hereto ("General Property" and "Dwelling building and Contents") and by reference incorporated herein shall be incorporated into the Standard Flood Insurance Policy.

(b) *Endorsements.* All endorsements to the Standard Flood Insurance Policy shall be final upon publication in the FEDERAL REGISTER for inclusion in Appendix A.

(c) *Applications.* The application and renewal application forms utilized by the National Flood Insurance Program shall be the only application forms used in connection with the Standard Flood Insurance Policy.

(d) *Waivers.* The Standard Flood Insurance Policy and required endorsements must be used in the Flood Insurance Program, and no provision of the said documents shall be altered, varied, or waived other than through the issuance of an appropriate amendatory endorsement, approved by the Administrator as to form and substance for uniform use.

(e) *Oral and written binders.* No oral binder or contract shall be effective. No written binder shall be effective unless issued with express authorization of the Administrator.

APPENDIX A(1)

FEDERAL EMERGENCY MANAGEMENT AGENCY, FEDERAL INSURANCE ADMINISTRATION

Standard Flood Insurance Policy

[Issued Pursuant to the National Flood Insurance Act of 1968, or Any Acts Amendatory Thereof]

DWELLING FORM—INSURING AGREEMENT

Agreement of Insurance Between the Federal Emergency Management Agency (FEMA), as Insurer, (hereinafter known as "we", "our", and "us") and the Insured (hereinafter known as "you" and "your"). Based upon your having paid the correct amount of premium, our reliance on the accuracy of the information and statements you have furnished in the application for this policy about the property to be insured and subject to all the terms of this policy, the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001 et seq.), and regulations issued by us (Title 44, Code of Federal Regulations), we insure you and your legal representatives against all "Direct Physical Loss by or from Flood" to the insured property as defined in the "Definitions Section" of this Agreement to the extent of the actual cash value of the property at the time of loss but not exceeding (1) the cost of replacing the insured building at the time of loss with material of like kind and quality and (2) the actual cash value of any insured personal property at the time of loss.

Now therfore, in consideration of the foregoing and the mutual promises exchanged herein, we and you agree, further, as follows:

Article I—Persons Insured

We insure only:

A. The named insured and legal representatives;

B. Any mortgagee and loss payee named in the application and declaration page in the order of precedence and to the extent of their interest but for no more, in the aggregate, than the interest of the named insured.

Article II—Definitions

"Actual Cash Value" means the replacement cost of an insured item of property at the time of loss, less the value of physical depreciation as to the item damaged.

"Application" means the statement made and signed by you or your agent, and giving information on the basis of which we determine the acceptability of the risk, the policy to be issued and the correct premium payment, which must accompany the application for the policy to be issued. The application is a party of this flood insurance policy.

"Basement" means a walled and roofed structure, other than a gas or liquid storage tank that is principally above ground and affixed to a permanent site, including a mobile home on foundation, subject to Article V(H), and a walled and roofed building in the course of construction, alteration or repair. This policy does not cover more than one building.

"Cancellation" means that ending of the insurance coverage provided by this policy prior to expiration date.

"Coastal High Hazard Area" means an area subject to high velocity waters, including hurricane wave wash and tsunami.

"Declaration Page" is a computer generated summary of information furnished by you in the application for insurance. The declarations page is a part of this flood insurance policy.

"Direct Physical Loss by or from Flood" means any loss in the nature of actual loss of or physical damage evidenced by physical changes to the insured property (building or personal property contents) which is directly and proximately caused by a "flood" (as defined in this Agreement), while the insured property is located: 1. at the property address shown on the application for this insurance, which is part of this Agreement; and 2. for forty-five days, at another place above ground level, or outside of the special flood hazard area to which any of the property shall necessarily be removed by you in order to protect and preserve it from flood or from the imminent danger of flood (provided, personal property so removed must be placed in a fully enclosed building or otherwise reasonably protected from the elements to be insured against loss), in which case the reasonable expenses incurred by you including the value of your own labor at prevailing Federal minimum wage rates in moving your insured property away from the peril of flood and storing your property at the temporary location shall be reimbursed to you. The term "Direct Physical Loss by or from Flood" shall not include compensation for loss of access, loss of use, loss of profits, or loss resulting from interruption of business, profession or manufacture, or reimbursement for your additional living expenses, incurred by reason of your having to live in rented quarters while the insured building is being repaired or replaced, or allowance for any increased cost of repair or reconstruction as a result of any ordinance regulating reconstruction or repair, or other economic loss.

"Doublewide Mobile Home" means a building which is fully anchored and affixed to its permanent site, and which is designed and constructed as a modular or manufactured building and which has axles and wheels

used solely for transportation to the lot or construction sie where it is to be assembled as a nonmoveable, permanent building; such a building is not considered to be a mobile home for purposes of this policy.

"Dwelling" means a building designed for use as a residence for no more than four families.

"Expense Constant": The expense constant is a flat charge per policy term, paid by the Insured to defray the Federal Government's policy-writing and other expenses.

"Expiration Date" means the ending of the insurance coverage provided by this policy on the expiration date shown on the delcaration page.

"Flood": Wherever in this policy the term "flood" occurs, it shall be held to mean:

A. A general and temporary condition of partial or complete inundation of normally dry land areas from:

1. The overflow of inland or tidal waters.

2. The unusual and rapid accumulation or runoff of surface waters from any source.

3. Mudslides (i.e., mudflows) which are proximately caused by flooding as defined in subparagraph A-2, above and are akin to a river of liquid and flowing mud on the surfaces of normally dry land areas, including your premises, as when earth is carried by a current of water and deposited along the path of the current.

B. The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water ex-

ceeding the cyclical levels which result in flooding as defined in A-1 above.

"Policy" means the entire written contract between you and us; it includes this printed form, the application, and declarations page, any endorsements which may be issued and any renewal certificates indicating that coverage has been instituted for a new policy and policy term. Only one building, specifically described by you in the application, may be insured under this policy.

"Walled and Roofed" means the building has in place two or more exterior, rigid walls and the roof is fully secured so that the building will resist flotation, collapse and lateral movement.

Article III—Losses Not Covered

We only provide coverage for direct physical loss by flood which means we do not cover:

A. Losses from other casualties including:

1. Loss caused by theft, loss of profits, fire, windstorm, wind, explosion, earthquake, land sinkage, land subsidence, landslide, gradual erosion, or any other earth movement except such mudslides (i.e., -mudflows) or erosion as is covered under the peril of flood.

2. Loss caused by rain, snow, sleet, hail, waterspray, freezing, thawing, the pressure or weight of ice or water, sewer backup and seepage of water unless your property has been, at the same time, damaged by a flood.

3. Water or moisture damage resulting primarily from any condition substantially confined to the insured building or from any condition which is within your control

(including but not limited to design, structural or mechanical defects, failures, stoppages or breakages of water or sewer lines, drains, pumps, fixtures or equipment).

B. Losses of the following nature:

1. Loss caused by your failure to use means reasonably accessible to you to save the property from loss resulting from a flood and to preserve the property from loss resulting from a flood and to preserve the property after a flood; however, when the insurance under this policy covers a building, the reasonable expenses incurred by you for the purchase of sandbags, including sand to fill them and plastic sheeting and lumber used in connection with them, for the purpose of saving the building due to the imminent danger of a flood loss and preserving the building at the premises after a flood loss, including the value of your own labor at prevailing Federal minimum wage rates, are a covered loss in an amount up to the amount of the minimum building deductible, without the policy's building deductible amount, as provided for at Article VI, being applied to this reimbursement, but being applied to any other benefits under the policy's building coverage. For reimbursement under this paragraph B.1 to apply, the following conditions must be met:

(i) The insured property must be in imminent danger of sustaining flood damage; and

(ii) The threat of flood damage must be of such imminence as to lead a person of common prudence to apprehend flood damage; and

(iii) a general and temporary condition of flooding in the area must occur, even if the flooding does not reach the insured property, or a legally authorized official must issue an evacuation order or other civil order for the community in which the insured property is located calling for

measures to preserve life and property from the peril of flood.

2. A loss which is already in progress as of 12:01 A.M. of the first day of the policy term, or as to any increase in the limits of coverage which is requested by you, a loss which is already in progress when you request the additional coverage.

3. A loss from a flood which is confined to the premises on which your insured property is located unless the flood is displaced over two acres of the premises.

4. A loss caused by your modification to the insured property or the described premises on which the insured property is located, which materially increases the risk of flooding.

5. Loss caused intentionally by you or any member of your household.

Article IV—Property Covered

We will pay for physical damage caused by flood to the building at the property address you have furnished, as well as the contents of the building, if you have purchased contents coverage, and provided you have paid the correct premium for the insurance, as follows:

A. We cover your dwelling, which includes:

1. A residential building, designed for principal use as a dwelling place for no more than four families or, as described in the Application as a residence designed for principal use as a dwelling place for no more than one family, we cover your dwelling unit in a condominium building, along with your insurable tenant in common interest in the building's common elements; provided that, should the amount of insurance collectible under this policy for a loss,

when combined with any recovery available to you as a tenant in common under any condominium association flood insurance coverage provided under the Act for the same loss, exceed the statutorily permissible limits of building coverage available for the insuring of single-family dwellings under the Act, then the limits of building coverage under this policy shall be reduced in regard to that loss by the amount of such excess;

2. Additions and extensions attached to and in contact with the dwelling;

3. Building equipment, fixtures and outdoor equipment used in connection with the dwelling while stored inside the dwelling or another fully enclosed building at the property address;

4. Materials and supplies to be used in constructing, altering or reparing the dwelling or another building insured by us at the property address while stored inside a fully enclosed building (i) at the property address or (ii) on an adjacent property at the time of loss, or (iii) in case of another building at the property address which does not have walls on all sides, while stored and secured to prevent flotation out of the building during flooding (the flotation out of the building shall be deemed by you and us to establish the conclusive presumption that the materials and supplies were not reasonably secured to prevent flotation, in which case no coverage is provided for such materials and supplies under this policy).

5. As appurtenant structures, detached garages and carports located at the described premises, at your option at the time of loss, in an amount up to 10% of the amount of insurance you have purchased to cover the dwelling, including additions to the dwelling; to the extent you exercise this option, you reduce the amount of insurance available to cover loss relating to A(1)(2)(3) and (4), above,

to the dwelling and this option may not be chosen so as to extend coverage to buildings: (i) occupied, rented or leased in whole or in part for dwelling purposes (or held for such use), or (ii) used in whole or in part for personal or commercial manufacturing or farming purposes (or held for such uses), or (iii) which are boathouses.

B. We cover your Personal Property as contents incidental to the occupancy of the building as a dwelling under the policy, subject to "C" below, and that belonging to members of your family in your household and, at your option within the limits of contents coverage purchased for personal property loss, guests' and servants' perrsonal property and the personal property of others for which you may be responsible—all while stored within a building at the property address. Personal property in the open and not stored in a building shall not be covered against loss by flood under this policy. However, personal property located in buildings having in place two or more rigid walls and a fully secured roof are covered if the contents are secured to prevent flotation out of the building during flooding; the flotation out of the building during flooding of any such contents shall be deemed by you and us to establish the conclusive presumption that the contents were not reasonably secured to prevent flotation. At your option at the time of loss, in an amount up to 10% of the amount of insurance you have purchased to cover personal property, this policy will also cover:

1. Loss to improvements, alterations, and additions made by you, as a Tenant, to an insured building at the property address;

2. If you are an individual condominium unit owner, loss to the interior walls, floors,a nd ceilings of your unit that are not otherwise covered under a condominium association policy.

C. Limitation: As a limitation on "B", above, we shall not reimburse you for loss in any one flood as to the following personal property to the extent the total loss of such property exceeds $250.00: paintings, etchings, pictures, tapestries, art, glass windows and other works of art (such as but not limited to statuary, marbles, bronzes, antique furniture, rare books, antique silver, necklaces, bracelets, gems, precious or semi-precious stones, articles of gold, silver, or platinum and furs or any article containing fur which represents its principal value. In the case of personal property owned by you in a condominium building, as a dwelling unit owner, as well as in common with other dwelling unit owners, should the amount of insurance collectible underr this policy for a loss, when combined with any recovery available to you as a tenant in common under any condominium association flood insurance coverage provided under the Act for the same loss, exceed the statutorily permissible limits of contents coverage available for the insuring of single-family dwelling owners under the Act, then the limits of contents coverage under this policy shall be reduced in regard to that loss by the amount of such excess.

D. Debris Removal: Within the limits of your coverage, we cover any expense you incur, including the value of your own labor at prevailing Federal minimum wage rates, as a result of removing debris of, on or from the insured property so long as the debris problem was directly caused by a flood.

E. Demolition Coverage: Within the limits of your coverage, you may apply all or part of the proceeds of any flood insurance claim you make under this policy toward the expenses you incur in removing damaged portions of

the insured building from the property location following a flood loss.

Article V—Property not Covered

We do not cover and will not pay for damage to or loss of any of the following:

A. Accounts, bills, currency, deeds, evidences of debt, money, coins, medals, postage stamps, securities, bullion, manuscripts, or other valuable papers or records and contents used in connection with any incidental commercial occupancy or use of the building.

B. On and after October 1, 1982, newly constructed or substantially improved buildings located seaward of mean high tide, or entirely in, on, or over water.

C. Fences, retaining walls, seawalls, outdoor swimming pools, bulkheads, wharves, piers, bridges, docks; other open structures located on or over water, including boat houses or other similar structures or buildings into which boats are floated or personal property in the open.

D. Land values, lawn, trees, shrubs or plants, growing crops, or livestock; underground structures and equipment including wells, septic tanks or septic systems; those portions of walks, driveways and other paved or poured surfaces, outside and foundation walls of the building.

E. Animals, birds, fish; aircraft, any self-propelled vehicle or machine and motor vehicles (other than motorized equipment pertaining to the service of the premises, operated principally on the premises of the insured, and not

licensed for highway use) including their parts and equipment, trailers on wheels and other recreational vehicles whether affixed to a permanent foundation or on wheels; watercraft including their furnishings and equipment; and business property.

F. Enclosures, contents, machinery, building components, equipment and fixtures located at an elevation lower than the lowest elevated floor of an elevated building (except for the required utility connections and the footing, foundation, posts, pilings, piers or other foundation walls and anchorage system as required for the support of the elevated building), including a mobile home; finished basement walls, floors, ceilings and other improvements to a basement having its floor subgrade on all sides, and contents, machinery, building equipment and fixtures in such basement areas; except that, as to this subparagraph (F), coverage is provided in basement areas and in areas below the lowest elevated floor of an elevated building for sump pumps, well-water tanks, oil tanks, furnaces, hot waterheaters, clothes washers and dryers, food freezers, air conditioners, heat pumps and electrical junction and circuit breaker boxes; and coverage is also provided in basement areas and in areas below the lowest elevated floor of an elevated building for stairways and staircases attached to the building which are not separated from the building by elevated walkways.

G. Buildings and their contents, including machinery and equipment, which are part of the building, where more than 49 percent of the actual cash value of such buildings is below ground, unless the lowest level is at or above the base flood elevation (in the Regular Program) or the adjacent ground level (in the Emergency Program) by reason of

earth having been used as an insulation material in conjunction with energy efficient building techniques;

H. On and after October 1, 1982, a mobile home located or placed within a FEMA designated Special Flood Hazard Area that is not affixed to a permanent site (anchored) to resist flotation, collapse, or lateral movement by providing over-the-top and frame ties to ground anchors or that otherwise does not meet the community's flood plain management requirements, unless it is a mobile home on a foundation continuously insured by the National Flood Insurance Program at the same site at least since September 30, 1982.

I. Units which are primarily containers, rather than buildings (such as gas and liquid tanks).

J. A mobile home and its contents located within a FEMA designated coastal high hazard area (Zones VI-V30 on a FEMA Flood Insurance Rate Map) which is not located in a mobile home park or subdivision in existence and open for business prior to June 1, 1982.

K. A building, and its contents, newly constructed or substantially improved on or after October 2, 1983, in an area designated as an undeveloped coastal barrier within the Coastal Barrier Resourses System established by the Coastal Barrier Resources Act (Pub. L. 97-348).

Article VI—Deductibles

A. Each loss to your insured property is subject to a deductible provision under which you bear a portion of the loss before payment is made under the policy.

B. The loss deductible shall apply separately to each building loss and personal property (contents) loss including, as to each, appurtenant structure, debris removal, and any reasonable expenses incurred after a flood under Article II or Article III in connection with the preservation and saving of insured property from flood or from the imminent danger of flood.

C. The amount of the deductible for each loss occurence is determined as follows: We shall be liable only when such loss exceeds $500.00, or the amount of any higher deductible which you selected when you applied for this insurance or when you raised the deductible by endorsement.

D. In the case of reasonable expenses incurred pursuant to Article II in the temporary removal of an insured mobile home or insured personal property from the described premises and away from the peril of flood, the amount of the deductible shall be $50.00.

Article VII—Replacement Cost Provisions

Subject to Article VI and the limits of building coverage you have purchased, these provisions shall apply only to a Single Family Dwelling which is covered under this policy. Outdoor antennas and aerials, carpeting, awnings, appliances and other outdoor equipment, all whether attached to the insured building or not, are excluded from the replacement cost coverage. For purposes of this Article VII, a single family dwelling qualifies as your principal residence provided that, at the time of the loss, you or your spouse have lived in your building for either (1) 80% of the calendar year immediately preceding the loss or (2) 80% of

the period of your ownership of the insured building, if less than one calendar year immediately preceded the loss. For purposes of this Article, the replacement cost provisions do not apply to a condominium unit within a vertical buildingg having one or more condominium units in it not contigous to the ground. Under this Article:

A. If at the time of loss of the total amount of insurance applicable to said dwelling is 80% or more of the full replacement cost of such dwelling, or is the maximum amount of insurance available under the National Flood Insurance Program, the coverage of this policy applicable to such dwelling is extended to include the full cost of repair or replacement (without deduction for depreciation).

B. If at the time of loss the total amount of insurance applicable to said dwelling is less than 80% of the full replacement cost of such dwelling and less than the maximum amount of insurance available under the National Flood Insurance Program, our liability for loss under this policy shall not exceed the larger of the following amounts:

1. The actual cash value (meaning replacement cost less depreciation) of that part of the dwelling damaged or destroyed; or

2. That portion of the full cost of repair or replacement without deduction for depreciation of that part of the dwelling damaged or destroyed, which the total amount of insurance applicable to said dwelling bears to 80% of the full replacement cost of such dwelling.

If 80% of the full replacement cost of such dwelling is greater than the maximum amount of insurance available under the National Flood Insurance Program, use the maximum amount in lieu of the 80% figure in the application of this limit.

C. Our liability for loss under this policy shall not exceed the smallest of the following amounts:

1. The limit of liability of this policy applicable to the damaged or destroyed building.

2. The replacement cost of the dwelling or any part thereof identical with such dwelling on the same premises and intended for the same occupancy and use; or

3. The amount actually and necessarily expended in repairing or replacing said dwelling or any part thereof intended for the same occupancy and use.

D. When the full cost of repair or replacement is more than $1,000 or more than 5% of the whole amount of insurance applicable to said dwelling, we shall not be liable for any loss under paragraph A or subparagraph B-2 of these provisions unless and until actual repair or replacement is completed.

E. In determining if the whole amount of insurance applicable to said dwelling is 80% or more of the full replacement cost of such dwelling, the cost of excavations, underground flues and pipes, underground wiring and drains, and brick, stone and concrete foundations, piers and other supports which are below the under surface of the lowest basement floor, or where there is no basement, which are below the surface of the ground inside the foundation walls, shall be disregarded.

F. You may elect to disregard this condition in making claim hereunder, but such election shall not prejudice your right to make further claim within 180 days after loss for any additional liability brough about by these provisions.

G. These Replacement Cost Provisions do not apply to any mobile home or personal property (contents) covered under this policy, nor do they apply to any loss where insured property is abandoned and remains as debris at the property address following a loss.

H. If your dwelling sustains a total loss or if we should pay you the entire building loss proceeds under these replacement cost provisions, there is no requirement that you rebuild the building at the insured property address.

Article VIII—General Conditions and Provisions

A. Pair and Set Clause: If you lose an article which is part of a pair or set, we will have the option of paying you an amount equal to the cost of replacing the lost article, less depreciation, or an amount which represent the fair proportion of the total value of the pair or set that the lost article bears to the pair or set.

B. Concealment, Fraud: We will not cover you under this policy, which shall be void, nor can this policy be renewed or any new flood insurance coverage be issued to you if you have sworn falsely, or willfully concealed or misrepresented any material fact, or done any fraudulent act concerning this insurance (See "F," below). In addition we will not cover you under this policy, which shall be void, in the event you have willfully concealed or misrepresented any fact on a "Recertification Questionnaire," which causes us to issue a policy to you based on a premium amount which is less than the premium amount which would have been payable by you were it not for the misstatement of fact (see "G," below).

C. Other Insurance: We shall not be liable for a greater proportion of any loss, less the amount of deductible, from the peril of flood than the amount of insurance under this policy bears to the whole amount of flood insurance (excluding therefrom any amount of "excess insurance" as hereinafter defined) covering the property, or which would have covered the property except for the existence of this insurance, whether collectible or not.

In the event that the whole amount of flood insurance (excluding therefrom any amount of "excess insurance" as hereinafter defined) covering the property exceeds the maximum amount of insurance permitted under the provisions of the National Flood Insurance Act of 1968, or any acts amendatory thereof, it is hereby understood and agreed that the insurance under this policy shall be limited to a proportionate share of the maximum amount of insurance permitted on such property under said Act, and that a refund of any extra premium paid, computed on a pro rata basis, shall be made by us upon request in writing submitted not later than 2 years after the expiration of the policy term during which such extra amount of insurance was in effect.

"Excess Insurance" as used herein shall be held to mean insurance of such part of the actual cash value of the property as is in excess of the maximum amount of insurance permitted under said Act with respect to such property.

D. Demandments, Waivers, Assignment: This Standard Flood Insurance Policy cannot be amended nor can any of its provisions be waived without the express written consent of the Federal Insurance Administrator. No action

we take under the terms of this policy can constitute a waiver of any of our rights. Except in the case of (1) a contents only policy and (2) a policy issued to cover a building in the course of construction, assignment of this policy, in writing, is allowed upon transfer of title without the consent of the Administrator.

E. Cancellation of Policy By You:

1. You can cancel this policy at any time but a refund of premium money will only be made to you when:

a. You cancel because you have transferred ownership of the insured property to someone else. In this case, we will refund to you, once we receive your written request for cancellation (signed by you), the excess of premiums paid by you which apply to the unused portion of the policy's term, pro-rata but with retention of the expense constant.

b. You cancel because we have determined that your property is not, in fact, in a special flood hazard area; and you were required to purchase flood insurance coverage by a private lender or Federal agency pursuant to P.L. 93-234, § 102; and the lender or Federal agency no longer requires the retention by you of the coverage. In this event, if no claims have been paid or are pending, your premium payments will be refunded to you in full, according to our applicable regulations, but with retention of the expense constant.

c. You cancel a policy having a term of three (3) years, on an anniversary date, and the reason for the cancellation is:

(i) A policy of flood insurance has been obtained or is being obtained in substitution for this policy and we have received a written concurrence in the cancellation from any mortgagee of which the NFIP has actual notice, or (ii)

you have extinguished the insured mortgage debt and are no longer required by the mortgage to maintain the coverage.

Refund of any premium, under this subparagrah "c", shall be on a short-rate basis.

F. Voidance, Reduction or Reformation of the Coverage By Us:

1.Voidance: This policy shall be void and of no legal force and effect in the event that any one of the following conditions occurs:

a. The property listed on the application is not eligible for coverage, in which case the policy is void from its inception;

b. The community in which the property is located was not participating in the National Flood Insurance Program on the policy's inception date and did not qualify as a participating community during the policy's term and before the occurrence of any loss for which you may receive compensation under the policy, in which case the policy is void from its inception date;

c. If, during the term of the policy, the participation in the National Flood Insurance Program of the community in which your property is located ceases, in which case the policy shall be deemed void effective at the end of the last day of the policy year in which such cessation occurred and shall not be renewed; in the event the voided policy included three policy years in a contract term of three years, you shall be entitled to a pro-rata refund of any premium applicable to the remainder of the policy's term after voidance of the policy;

d. In the event you or your agent have (i) sworn falsely or (ii) fraudulently or willfully concealed or misrepresented any material fact (including facts relevant

to the rating of this policy) in the application for coverage, or upon any renewal of coverage, or in connection with the sumission of any claim brought under the policy shall be void as of the date the wrongful act was committed or from its inception if this policy is a renewal policy and the wrongful act occurred in connection with an application for or renewal or endorsement of a policy issued to you in a prior year and affects the rating of or premium amount received for this policy. Refunds of premiums, if any, shall be subject to offsets for our administrative expenses (inclusing the payment of agent's commissions for any voided policy year, in connection with the issuance of the policy);

e. The premium you submit is less thatn $50.00 in connection with any application for a new policy or policy renewal, in which case the policy is void from its inception date.

2. Reduction of coverage limits or reformation. In the event that the premium payment received by us is not sufficient to purchase the amounts of building coverage and contents (personal property) coverage requested or in the event a rating error has been innocently made by you or your agent on the application, renewal, endorsement, or other form (whether evident or not) resulting in insufficient premium being received by us for the purchase of the amounts of coverage requested, then:

(i) If the insufficient premium or other rating error is discoverd by us prior to a loss under the policy, the policy shall be deemed to provide only such coverage as can be purchased, for the entire term of thepolicy, for the amount of premium received; provided, you may increase any reduced coverage(s) at any time by payment of the correct premium for the additional limits of coverage requested and any such correct premium received by us prior to any loss under the policy shall result in coverage being provid-

ed for the loss up to the additional amount of coverage requested by you. The application of the insufficient premium recieved to the provision of flood insurance coverage shall be made as follows:

a. In the event that only one kind of coverage (building coverage or contents coverage) has been requested, you shall receive the limits of that kind of coverage which can be purchased for the amount of premium received, less the expense constant;

b. In the event that both building coverage and contents coverage have been requested, we shall determine the percentage ratio that each kind of insurance bears to the total amount of coverage requested, apportion the total premium received by the percentage ratio for each kind of coverage, and you shall receive, as to each kind of coverage requested, the amount of coverage which can be purchased by the premium amount as apportioned for each kind of coverage; where both building and contents coverage are requested and where the application of the above percentage ratio causes the premium recieved, as apportioned by the ratio, to produce an amount of premium for one of the kinds of coverage to be more than sufficient to purchase the amount of insurance of that kind of coverage requested by you, any such excess of apportioned premium will be applied to obtain an additional amount of the other kind of coverage until the amount of insurance request for the other coverage is obtained;

c. Provided, however, under this subsection (2.)(i) as to any mortgagee (or trustee) named in the policy, we shall give a notice of additional premium due and the right of reformation shall continue in force for the benefit only of the mortgagee (or trustee) up to the amount of your indebtedness, for thirty (30) days after written notice to the mortgagee (or trustee).

(ii) If the insufficient premium or other rating error is discoverd by us at the time of a loss under the policy, the policy shall be deemed to provide coverage pursuant to the provisions of (i), above, unless:

a. You or your agent have sworn falsely or fraudulently or willfully concelaed or misrepresented any material fact (including facts relevant to the rating of this policy) in the application for coverage, or upon any renewal of coverage, or in connection with the submission of any claim brought under this policy, in which case tis entire policy shall be void as of the date the wrongful act occurred in connection with an application for or renewal or endorsement of a policy issued to you in a prior year and affects the rating of or premium amount received for this policy. Refunds of premiums, if any, shall be subject to offsets for our administrative expenses (including the payment of agent's commissions for any voided policy year, in connection with the issuance of the policy);

b. Provided (ii) a., above does not apply, you remit and we receive the additional premium required to purchase (for the current policy term and the previous policy term, if then insured) the limits of coverage for each kind of coverage as was initially requested by you within thirty (30) days from the date we give you written notice of additional premium due in which case the policy shall be reformed , from its inception date, to provide flood insurance coverage to you in the amounts of coverage intitially requested. Silence or other failure to remit the additional premium due and any subsequent payment of the additional premium due shall not reform the policy from its inception date but shall only add the additional amounts of coverage to the policy for the remainder of its term, pursuant to 44 CFR 61.11, with any excess of premium paid being returned to you. Provided, however, under this

subsection "B" as to any mortgagee (or trustee) named in th epolicy, we shall give a notice of additional premium due and the right of reformation shall continue in force for the benefit only off the mortgagee (or trustee) named in the policy. we shall give a notice of additional premium due and the right of reformation shall continue in force for the benefit only of the mortgagee (or trustee), up to the amount of your indebtedness, for thirty (30) days after written notice ot the mortgagee (or trustee). Provided, further, we are under no obligation to send you any written notice of premium due under this subsection.

G. Policy Renewal: The term of this policy commences on its inception date and ends on its expiration date, as shown on the "Declaration Page" which is attached to the policy. We are under no obligation to send you any renewal notice or other notice that your policy term is coming to an end and the receipt of any such notice by you shall not be deemed to be a waiver of this provision on our part. We are under no obligation to assure that policy changes reflected in endorsements submitted by you during the policy term and accepted by us are included in any renewal notice or new policy which we send to you. "Policy changes" includes the addition by you of new coverage (e.g. contents coverage added to a building coverage policy or vice versa) or any increases in the amounts of coverage.

This policy shall not be renewed and the coverage provided by it shall not continue into any successive policy term unless the premium payment for any successive policy term is received by us at the National Flood Insurance Program (NFIP), prior to the expiration date of this policy, subject to Article VIII (F.), above. The renewal premium payment shall be deemed to be received by the

NFIP if the renewal payment is mailed to the NFIP prior to the expiration date and is received by the NFIP prior to or within five (5) days following the expiration date or if the renewal payment is mailed by certified mail to the NFIP prior to the expiration date or if the renewal payment is mailed by certified mail to the NFIP prior to the expiration date. In all other cases, whether the renewal premium payment is received by the NFIP after the expiration date of this policy or not, this policy shall be deemed terminated as of the expiration date of the last policy term for which the premium payment was timely received by the NFIP and, in that event, we shall not be obligated to provide you with any cancellation, termination, policy lapse, or policy renewal notice advising you of any such cancellation, termination, policy lapse or policy renewal; provided, however, with respect to any mortgagee (or trustee) named in the declarations form attached to this policy, this insurance shall continue in force only for the benefit of such mortgagee (or trustee) for 30 days after written notice to the mortgagee (or trustee) of termination of this policy, and shall then terminate.

In connection with the renewal of this policy, you will be requested during the policy term to recertify, on a Recertification Questionnaire we will provide you, the rating information used to rate your most recent application for or renewal of insurance.

Notwithstanding your responsibility to submit the appropriate renewal premium in sufficient time to permit its receipt by us prior to the expiration of the policy being renewed, we have extablished a business procedure for mailing renewal notices to assist insureds in meeting their responsibility. Regarding our business procedure, evidence

of the placing of any such notices into the U.S. Postal Service, addressed to you at the address appearing on your most recent application or other appropriate form (received by the NFIP prior to the mailing of the renewal notice by us), does, in all respects, for purposes of the NFIP presumptively establish delivery to you for all purposes irrespective of whether you actually received the notice. However, in the event we determine that, through any circumstances, any renewal notice was not placed into the U.S. Postal Service, or, if placed, was prepared or addressed in a manner which we determine could preclude the likelihood of it being actually and timely received by you prior to the due date for the renewal premium, the following procedures shall be followed:

In the event that you or your agent notifies us no later than one year after the date on which the payment of the renewal was due, of a nonreceipt of a renewal notice prior to the due date for the renewal premium, which we determine was attributable to the above circumstances, we shall mail a second bill providing a revised due date, which shall be thirty days after the date on which the bill is mailed. If the renewal payment is received by such revised due date, the policy shall be renewed as of the date on which the prior policy would have expired. If the renewal payment is requested by reason of the second bill is not received by the revised due date, no renewal shall occur and the policy shall remain an expired policy as of the expiration date prescribed on the policy.

H. Alterations and Repairs: You may, at any time, make alterations, additions and repairs to the insured property and complete structures in the course of construction. Consistent with your obligation to protect insured

property damaged by a flood from further damage, as set forth in "I", below, you may also—following a loss by flood—make reasonable repairs of a temporary or permanent nature to protect the damaged, insured property from further damage and, to the extent you keep an accurate record of such repair expenditures, the cost of any such repairs—shall be included in determining the amount of loss covered by this policy.

I. Requirements in Case of Loss: Should a flood loss occur to your insured property, you must:

1. Notify us in writing as soon as practicable;

2. Protect the property from further damage;

3. As soon as reasonably possible, separate the damaged and undamaged property, putting it in the best possible order so that we may examine it; and

4. Within 60 days after the loss, send us a proof loss, which is your statement as to the amount you are claiming under the policy signed and sworn to by you and furnishing us with the following information.

a.The date and time of the loss,

b. A brief explanation of how the loss happened,

c. Your interest in the property damaged (for example, "owner") and the interests, if any, of others in the damaged property,

d. The actual cash value of each damaged item of insured property after depreciation is deducted from the cost of replacement of the property (unless the policy's "REPLACEMENT COST PROVISIONS" apply, in which case the replacement cost without allowance for depreciation should be furnished) and the amount of damages sustained,

e. Names of mortgagees or anyone else having a lien, charge or claim against the insured property,

f. Details as to any other contracts of insurance covering the property, whether valid or not,

g. Details of any changes in ownership, use, occupancy, location or possession of the insured property since the policy was issued,

h. Details as to who occupied any insured building at the time of loss and for what purpose, and

i. The amount you claim is due under this policy to cover the loss, including statements concerning:

(i) The limits of coverage stated in the policy,

(ii) The cost to repair or replace the damaged property (whatever costs less).

5. The insurance adjuster whom we hire to investigate your claim may furnish you with a proof of loss form, and she or he may help you to complete it. However, this is a matter of courtesy only, and you must still send us a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help you complete it. In completing the proof of loss, you must use your own judgment concerning the amount of loss and the justification for that amount; the adjuster is not authorized to approve or disapprove claims or to tell you whether your claim will be approved by us.

6. We may, at your option, waive the requirement for the completion and filing of Proof of Loss in certain cases, in which event you will be required to sign and, at our option, swear to an adjuster's report of the loss which includes information about your loss and the damages needed by us in order to adjust your claim;

7. Any false statements made in the course of presentment of a claim under this policy may be punishable by fine or imprisonment under the applicable Federal laws.

J. Our Options After a Loss: Options we may, in our

sole discretion, exercise after a loss include the following:

1. *Evidence of Loss*—If we specifically request, in writing, you may be required to furnish us with a complete inventory of the destroyed, damaged and undamaged property, including details as to quantities, costs, actual cash values, amounts of loss claims, and any written plans and specificationss for repair of the damaged property which you can make reasonably available to us.

2. *Examination Under Oath*-We may require you to show us or our designee, the damaged property, to be examined under oath by our designee and to sign any transcripts of such examinations; to, at such reasonable times and places as we may designate, permit us to examine and make extracts and copies of all books of accounts, bills, invoices and other vouchers, or certified copies thereof if the originals are lost, pertaining to the damaged property.

3. *Options to Repair or Replace*—We may take all or any part of the damaged property at the agreed or appraised value and, also, to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving you notice of our intention to do so within 30 days after the receipt of the proof of loss herein required under "I", above.

4. *Adjustment Options*—We may adjust loss to any insured property of others with the owners of such property or with you for their account. Any such insurance under this policy shall not inure directly or indirectly to the benefit of any carrier or other bailee for hire.

K. When Loss Payable: Loss is payable within 60 days after you file your proof of loss (or witin 90 days after the insurance adjuster files an adjuster's report signed and sworn to by you in lieu of a proof of loss) and ascertainment of the loss is made either by agreement between us and you expressed in writing or by the filing with us of an award as provided in paragaph "M", below. If we reject your proof of loss in whole or in part, you may accept such denial of your claim, or exercise your rights under this policy, or file an amended proof of loss as long as it is filed within 60 days of the date of the loss or any extension of time allowed by the Administrator.

L. Abandonment. You may not abandon damaged or undamaged insured property to us. However, we may permit you to keep damaged, insured property ("salvage") after a loss and reduce the amount of the loss proceeds payable to you under the policy by the value of the salvage.

M. Appraisal. If at any time after a loss, we are unable to agree with you as to the actual cash value—or, if applicable, replacement cost—of the damaged property so as to detrmine the amount of loss to be paid to you, then, on the written demand of either one of us, each of us shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing, after 15 days, to agree upon such umpire, then, on your request or our request, such umpire shall be selected by a judge of a court of record in the State in which insured property is located. The appraisers shall then appraise the loss, stating separately replacement cost, actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to

to the umpire. An award in writing, so itemized, of any two (aprraisers or appraiser and umpire) when filed with us shall determine the amount of actual cash value and loss or, should this policy's replacement cost provisions apply, the amount of replacement costs and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by both of us equally.

N. Loss Clause. If we pay you for damage to property sustained in a flood loss, you are still eligible, during the term of the policy, to collect for a subsequent loss due to another flood. Of course, all loss arising out of a single, continuous flood of long duration shall be adjusted as one flood loss.

O. Mortgagee Clause—(Applicable to building items only and effective only when policy is made payable to a morgagee (or trustee) named in the application and declarations form attached to this policy or of whom the Insurer has actual notice prior to the payment of loss proceeds under this policy.)

Loss, if any, under this policy, shall be payable to the aoresaid as mortgagee (or trustee) as interest may appear under all present or future mortgages upon the property described in which the aforesaid may have an interest as mortgagee (or trustee), in order of precedence of said mortgages, and this insurance, as to the interest of the mortgagee (or trustee), in order of precedence of said mortgages, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change

in the title or ownership of the property, nor by the occupationof the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided, also, that the mortgagee (or trustee) shall notify the Insurer of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

If this policy is cancelled by the Insurer, it shall continue in force for the benefit only of the mortgagee (or trustee) for 30 days after written notice to the mortgagee (or trustee) of such cancellation and shall then cease, and the Insurer shall have the right, on like notice, to cancel this agreement.

Whenever the Insurer shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, the Insurer shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, as its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subroga-

tion shall impair the right of the mortgagee (or trustee) to recover the full amount of said mortgagee's (or trustee's) claim.

P. Mortgagee obligations—If the insured fails to render proof of loss, the named morgagee (or trustee) upon notice, shall render proof of loss in the form herein specified within 60 days thereafter and shall be subject to the provisions of this policy relating to appraisal and time of payment and of bringing suit.

Q. Conditions for filing a lawsuit—You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, you must start the suit within twelve (12) months from the date we mailed you notice that we have denied your claim, or part of your claim, and you must file the suit in the United States District Court for district in which the insured property was located at the time of the loss.

R. Subrogation—Whenever we make a payment for a loss under this policy, we are subrogated to your right to recover for that loss from any other person. That means that your right to recover for a loss that was partly or totally caused by someone else is automatically transferred to us, to the extent that we have paid you for the loss. We may require you to acknowledge this transfer in writing. After the loss, you may not give up our right to recover this money or do anything which would prevent us from recovering it. If you make any claim against any person who caused your loss and recover any money, you must pay us back first before you may keep any of that money.

Article IX—Liberalization Clause

While this policy is in force, should we have adopted any forms, endorsements, rules or regulations by which this policy could be broadened or extended for your benefit by endorsement or substitution of policy form, then, such matters shall be considered to be incorporated in this policy without additional premium charge and shall inure to your benefit as though such endorsement of substitution of policy form had been made.

Article X—What Law Governs

This policy is governed by the flood insurance regulations inssued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. §4001, *et seq.*) and Federal common law.

In witness whereof, we have signed this policy below and hereby enter into this Insurance Agreement.

JEFFREY S. BRAGG,
Administrator, Federal Insurance Administration.

(National Flood Insurance Act of 1969, as amended (Title XIII of the Housing and Urban Development Act of 1968), 42 U.S.C. 4001-4128; Reorganization Plan No. 3 of 1978 (43 FR 41943), E.O. 12127, dated Mar. 31, 1979 (44 FR 19367) E.O. 11988, dated May 24, 1977 and 44 CFR 9, Delegation of Authority to Federal INsurance Administrator)

[47 FR 19142, May 4, 1982, as amended at 48 FR 39069, Aug. 29, 1983; 48 FR 42818, Sept. 20, 1983; 49 FR 33657, Aug. 24, 1984]

APPENDIX A(2)

FEDERAL EMERGENCY MANAGEMENT AGENCY, FEDERAL INSURANCE ADMINISTRATION

STANDARD FLOOD INSURANCE POLICY

[Issued Pursuant ot the National Flood Insurance Acts of 1968, or Any Act Amendatory Thereof]

General Property Form

In consideration of the payment of the premium, in reliance upon the statements in the application and declarations form made a part hereof and subject to all the terms of this policy, the Insurer does insure the Insured and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss. Without allowance for any increased cost of repair or reconstruction by reason of only ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all *direct loss by or from "flood"* as defined herein, to the property described while located or contained as described in the application and declarations form attached hereto or pro rata for 45 days at each proper place to which any of the property shall necessarily be removed for preservation from the peril of "Flood", but not elsewhere.

Assignment of this policy by the Insured is allowed.

The Insurer under this Policy is the Federal Emergency Management Agency.

Persons Insured

The following are insured under this policy:

A. The named insured and legal representatives:

B. Any morgagee and loss payee named in the application and declaration page in the order of precedence and to the extent of their interest but for no more, in the aggregate, than the interest of the named insured.

Definitions

Definitions - As used in this Policy:

"Actual cash value" means the replacement cost of an insured item of property at the time of loss, less the value of physical depreciation as to the item damaged.

"Application" means the statement made and signed by the Insured, or the Insured's agent, and giving information on the basis of which the Insurer determines the acceptability of the risk, the policy to be issued and the correct premium payment, which must accompany the application for the policy to be issued. The application is a part of this flood insurance policy.

"Basement" means any area of the building having its floor subgrade (below ground level) on all sides.

"Building" means a walled and roofed structure,

other than a gas or liquid storage tank that is principally above ground and affixed to a permanent site, including a walled and roofed building in the course of construction, alteration or repair and a mobile home on foundation, subject to Paragraph "H" of the provision titled "Property Not Covered". This policy does not cover more than one building.

"Cancellation means that ending of the insurance coverage provided by this policy prior to the expiration date

"Coastal high hazard area" means an area subject to high velocity waters including hurricane wave wash and tsunamis.

"Declarations page" is a computer generated summary of information furnished by the Insured in the application for insurance. The declarations page is a part of this flood insurance policy.

"Direct physical loss by or from flood" means any loss in the nature of actual loss of or physical damage, evidenced by physical changes, to the insured property (building or personal property contents) which is directly and proximately caused by a "flood)) (as defined in this Agreement), while the insured propoerty is located: 1. at the property address shown on the application for this insurance, which is a part of this Agreement; and 2. for forty-five days, at another place above ground level or outside of the special flood hazard area to which any of the property shall necessarily be removed in order to protect and preserve it from a flood or from the imminent danger of flood (provided, personal property so removed must be

placed in a fully enclosed building or otherwise reasonably protected form the elements to be insured against loss). The term "Direct Physical Loss by or from Flood" shall not include compensation for loss of use, loss of access, loss of profits or loss resulting from interruption of business, profession or manufacture, allowance for any increased cost of repair or reconstruction as a result of any ordinance or reapir regulating reconstruction or repair, or other economic loss.

"Double-wide mobile home" means a building which is fully anchored and affixed to its permanent site, and which is designed and constructed as a modular or manufacture building an which has axles and wheels used solely fore transportation to the lot or construction site where it is to be assembled as a non-movable, permanent building; such a building is not considered to be a mobile home for purposes of this policy.

"Expense constant" is a flat charge per policy term, paid by the Insured, to defray the Federal Government's policywriting and other expense.

"Expiration date" means the ending of the insurance coverage provided by this policy on the expiration date shown on the declaration page.

"Flood": Wherever in this policy the term "flood" occurs, it shall be held to mean:

A. A general and temporary condition of partial or complete inundation of normally dry land areas from:

1. The overflow of inland or tidal waters.

2. The unusual and rapid accumulation or runoff of surface waters from any source.

3. Mudslides (i.e., mudflows) which are proximately caused by flooding as defined in subparagraph A-2 above and are akin to a river of liquid and flowing mud on the surfaces of normally dry land areas, as when earth is carried by a current of water and deposited along the path of the current.

B. The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding the cyclical levels which result in flooding as defined in A-1 above.

"Policy" means the entire written contract between the Insured and the Insurer, including this printed form, the application and declarations page, any endorsements which may be issued and any renewal certificates indicating that coverage has been instituted for a new policy and policy term. Only one building, specifically described by you in the application, may be insured under this policy.

"Walled and roofed" means the building has in place two or more exterior, rigid walls and the roof is fully secured so that the building will resist flotation, collapse and lateral movement.

Perils Excluded

The Insurer shall not be liable for loss:

A. By (1) rain, snow, sleet, hail or water spray; (2) freezing, thawing or by the pressure or weight of ice or water except where the property covered has been simultaneously damaged by flood; (3) water moisture or mudslide (i.e., mudflow) damage of any kind resulting

primarily from conditions, causes or occurrences which are solely related to the described premises or are within the control of the insured (including but not limited to design, structural or mechanical defects, failures, stoppages or breakages of water or sewer lines, drains, pumps, fixtures, or equipment) or any condition which causes flooding which is substantially confined to the described premises or properties immediately adjacent thereto or; (4) seepage backup of water, or hydrostatic pressure not related to a condition of "flood" as defined;

B. Caused directly or indirectly by (1)hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (a) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces, or (b) by military, naval or air forces, or (c) by an agent of any such government, power, authority or forces, it being understood that any discharge, explosion or use of any weapon of war employing nuclear fission or fusion shall be conclusively presumed to be such a hostile or warlike action by such a government power authority or forces; (2) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering combating or defending against such an occurrence;

C. By nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled or due to any act or condition incident to any of the foregoing whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by the peril insured against by this policy;

D. By theft, fire, windstorm, wind, explosion, earthquake, land sinkage, land subsidence, landslide, gradual erosion, or any other earth movement except such mudslides (i.e., mudflows) or erosion as is covered under the peril of the flood.

E. Caused by or resulting from power, heating or cooling failure, unless such failure results from physical damage to power, heating or cooling equipment situated on premises where the property covered is located caused by the peril insured against.

F. Caused directly or indirectly by neglect of the Insured to use all reasonable means to save the property from loss resulting from a flood and to preserve the property after a flood; however, when the insurance under this policy covers a building, the reasonable expenses incurred by the Insured for the purpose of sandbags, including sand to fill them and plastic sheeting and lumber used in connection with them, for the purpose of saving the buildng due to the imminent danger of a flood loss and preserving the building at the premises after a flood loss, are a covered loss in an amount up to the amount of the minimum building deductible, without the policy's building deductible amount, as provided for herein under "DEDUCTIBLES" being applied to this reimbursement, but being applied to any other benefits under the policy's building coverage. For reimbursement under this paragraph "F" to apply, the following conditions must be met:

(i)The insured property must be in imminent danger of sustaining flood damage; and

(ii) the threat of flood damage must be of such imminence as to lead a person of common prudence to apprehend flood damage; and

(iii) a general and temporary condition of flooding in the area must occur, even if the flooding does not reach the insured property, or a legally authorized legal official must issue an evacuation order or other civil order for the community in which the insured property is located calling for measures to preserve life and property from the peril of flood. Provided, further, that for contents covered herein and subject to the terms of the policy, including the limits of liability, the Insurer will reimburse the Insured for reasonable expenses necessarily incurred by him for removal or temporary storage (not exceeding 45 days), or both, of insured contents, from the described premises because of the imminent danger of flood if the contents so removed are placed in a fully enclosed building or otherwise reasonably protected from the elements.

G. Caused intentionally by the Insured.

H. Which is already in progress as of 12:01 a.m. of the first day of the policy term.

I. From a flood which is confined to the premises on which the insured property is located unless the flood is displaced over two acres of the insured premises.

J. Caused by any modification by the Insured to the insured property or the described premises on which the insured property is located which materially increases the risk of flooding.

Property Covered

A. *Building.* When the insurance under this policy covers a building, such insurance shall include additions

and extensions attached thereto; permanent fixtures, machinery and equipment forming a part of and pertaining to the service of the building; personal property of the insured as landlord used for the maintenance or service of the building including fire extinguishing apparatus, floor coverings, refrigerating and ventilating equipment, all while within the described building; also, materials and supplies while within an enclosed structure located on the described premises or adjacent thereto, intended for use in construction alteration or repair of such building or appurtenant private structures on the described premises.

B. *Contents.* When the insurance under this policy covers contents, coverage shall be for either household contents or other than household contents, but not for both.

1. When the insurance under this policy covers other than household contents, such insurance shall cover merchandise and stock, materials and stock supplies of every description; furniture, fixtures, machinery and equipment of every description all owned by the insured; improvements and betterments (as hereinafter defined) to the buildng if the insured is not the owner of the buildng and when not otherwise covered; all while within the described inclosed building.

2. When the insurance under this policy covers household contents, such insurance shall cover all household and personal property usual or incidental to the occupancy of the premises as a residence - except animals, birds, fish, business property, other property not covered under the provisions of this policy, and any property more specifically coverd in whole or in part by the other insurance including the peril insured against in this policy; belonging to the Insured or members of the Insured's family of the same household, or for which the Insured may be

liable, or, at the option of the Insured, belonging to a servant or guest of the Insured; all while within the described building.

The Insured, if not the owner of the described building, may apply up to 10% of the amount of insurance applicable to the household contents covered under this item, not as an additional amount of insurance, to cover loss to improvements and betterments (as hereinafter defined) to the described building

The Insured, if an individual condominium unit owner in the described building, may apply up to 10% of the amount of insurance on contents covered under this policy, not as an additional amount of insurance, to cover loss to the interior walls, floors and ceilings that are not otherwise coverd under a condominium association policy on the described building.

The Insurer shall not be liable for loss in any one occurrence for more than $250 in the aggregate on paintings, etchings, pictures, tapestries, art glass windows and other works of art (such as but not limited to statuary, marbles, bronzes, antique furniture, rare books, antique silver, procelains, rare glass, and bric-a-brac), jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, articles of gold, silver, platinum and furs and any article containing fur which represents it principal value.

3. When the insurance under this policy covers improvements and betterments, such insurance shall cover the Insured's used interest in improvements and betterments to the described building.

(a) The term "improvements and betterments" wherever used in this policy is defined as fixtures, alterations, installations, or additions comprising a part of the described building and made, or acquired, at the expense of the Insured exclusive of rent paid by the Insured, but

which are not legally subject to removal by the Insured.

(b) The word "lease" wherever used in this policy shall mean the lease or rental agreement, whether written or oral, in effect as of the time of loss.

(c) In the event improvements and betterments are damaged or destroyed during the term of this policy by the peril insured against, the liability of the Insurer shall be determined as follows:

(1) If repaired or replaced at the expense of the Insured within a reasonable time after such loss, the actual cash value of the damaged or destroyed improvements and betterments.

2. If not repaired or replaced within a reasonable time after such loss, that proportion of the original cost at time of installation of the damaged or destroyed improvements and betterments which the unexpired term of the lease at the time of loss bears to the period(s) from the date(s) such improvements and betterments were made to the expiration date of the lease.

(3) If repaired or replaced at the expense of others for the use of the Insured, there shall be no liability hereunder.

C. *Debris Removal.* This insurance covers expense incurred in the removal of debris of or on the building or contents coverd hereunder, which may be occasioned by loss caused by the peril insured against in this policy.

The total liability under this policy for both loss to property and debris removal expense shall not exceed the amount of insurance applying under this policy to the property covered.

Property Not Covered

This policy shall not cover:

A. Accounts, bills, currency, deeds, evidences of debt, money, coins, medals, postage stamps, securities, bullion, manuscripts, or other valuable papers or records.

B. On and after October 1, 1982, newly constructed and substantially improved buildings located seaward of mean high tide, or entirely in, on, or over water.

C. Fences, retaining walls, seawalls, swimming pools, bulkheads, wharves, piers, bridges, docks; other open structures located on or over water, including boathouses or other similar structures or buildings into which boats are floated; or personal property in the open.

D. Land values, lawn, trees, shrubs or plants, growing crops, or livestock; underground structures and equipment including wells, septic tanks or septic systems; those portions of walks, driveways and other paved or poured surfaces outside the foundation walls of the building.

E. Aircraft, any self-propelled vehicle or machine and motor vehicles (other than motorized equipment pertaining to the service of the premises, operated principally on the premises of the insured, and not licensed for highway use) including their furnishings and equipment; and business property.

F. Enclosures, contents machinery, building components, equipment and fixtures located at an elevation lower than the lowest elevated floor of an elevated building (except for the required utility connections and the footing, foundation, posts, pilings, piers or other foundation walls

and anchorage system as required for the support of the elevated building), including a mobile home; finished basement walls, floor, ceilings and other improvement to a basement having its floor subgrade on all sides, and contents machinery, building equipment and fixtures in such basement areas; except that, as to this subparagraph (F), coverage is provided in basement areas below the lowest elevated floor of an elevated building for sump pumps, well-water tanks, oil tanks, furnaces, heat pumps and electrical junction and circuit breaker boxes; and coverage is also provided in basement area and in areas below the lowest elevated floor of an elevated building for stairways and staircases attached to the building which are not separated from the building by elevated walkways.

G. Building and their contents, including machinery and equipment, which are part of the building, where more than 49 percent of the actual cash value of such buildings is below ground, unless the lowest level is at or above the base flood elevation (in the Regular Program) or the adjacent ground level (in the Emergency Program) by reason of earth having been used as an insulation material in conjunciton with energy efficient building techniques;

H. On and after October 1, 1982, a mobile home located or placed within a FEMA designated Special Flood Hazard Area that is not affixed to a permanent site (anchored) to resist flotation, collapse, or lateral movement by providing over-the-top and frame ties to ground anchors or that otherwise does not meet the community's flood plain management requirements, unless it is a mobile home on a foundation continuously insured at the same site by the Naitonal Flood Insurance Program, at least since September 30, 1982.

I. Units which are primarily containers, rather than buildings (such as gas and liquid tanks, chemical or reactor container tanks or encosures, brick kilns, and similar units) and their contents (Silos and grain storage buildings including their contents, may be insured even though they may be of container-type construction).

J. A mobile home and its contents located within a FEMA designated coastal high hazard area (Zones V1-V30 on a FEMA Flood Insurance Rate Map) which is not located in a mobile home park or subdivision in existence and open for business prior to June 1, 1982.

K. A building, and its contents, newly constructed or substantially improved on or after October 1, 1983, in an area designated as an undeveloped coastal barrier within the Coastal Barrier Resources System established by the Coastal Barrier Resources Act (Pub. L. 97-348).

Deductibles

A. With respect to loss to the building and debris removal covered hereunder, Insurer shall be liable for only that portion of the loss in any one occurrence which is inexcess of $500.00.

B. With respect to loss to contents, the reasonable expenses incurred by the Insured pursuant to paragraph "F" of "Perils Excluded," and debris removal coverage hereunder, the Insurer shall be liable for only that portion of the loss in any one occurrence which is in excess of $500.00.

C. In lieu of the $500.00 deductible, the amount of

the deductible in "A" and "B," above, shall be the higher amount selected, as an option, by the Insured when applying for this insurance or when raising the deductible by endorsement.

D. In the case of reasonable expenses incurred in the removal of an insured mobile home or personal property from the insured premises away from the peril of flood, the amount of the deductible shall be $50.00

General Conditions And Provisions

A. *Pair and Set Clause.* If there is loss of an article which is part of a pair or set, the measure of loss shall be a reasonable and fair proportion of the total value of the pair or set, giving consideration to the importance of said article, but such loss shall not be construed to mean total loss of the pair or set.

B. *Concealment, Fraud.* This entire policy shall be void and no renewal nor new flood insurance coverage can be issued to the Insured if, whether before or after the loss, the Insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the Insured therein, or in case of any fraud or false swearing by the Insured relating thereto (see "E," below). In addition, this entire policy shall be void if the Insured has willfully concealed or misrepresented any fact on a "Recertification Questionnaire," which causes the Insurer to issue a policy to the Insured based on a premium amount which is less than the premium amount which would have been payable by the Insured if it were not for the misrepresentation of fact (see "J," below).

C. *Other Insurance.* The Insured shall not be liable for a greater proportion of any loss, less the amount of deductible, from the peril of flood than the amount of insurance under this policy bears to the whole amount of flood insurance (excluding therefrom any amount of "excess insurance" as hereinafter defined) covering the property, or which would have covered the property except for the existence of this insurance, whether collectible or not.

In the event that the whole amount of flood insurance (excluding therefrom any amount of "excess insurance" as hereinafter defined) covering the property exceeds the maximum amount of insurance permitted under the provisions of the National Flood Insurance Act of 1968, or any acts amendatory thereof, it is hereby understood and agreed that the insurance under this policy shall be limited to a proportionate share of the maximum amount of insurance permitted on such property under said Act, and that a refund of any extra premium paid, computed on a pro rata basis, shall be made by the insurer upon request in writing submitted not later than 2 years after the expiration of the policy term during which such extra amount of insurance was in effect.

"Excess Insurance" as used herein shall be held to mean insurance of such part of the actual cash value of the property as is in excess of the maximum amount of insurance permitted under said Act with respect to such property.

D. *Added and Waiver Provision.* The extent of the application of insurance under this policy and of the contribution to be made by the Insurer in case of loss, and any other provision or agreement not inconsistent with the pro-

visions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of the Insurer relating to appraisal or to any examination provided for herein.

E. *Voidance, Reduction or Reformation of the Coverage:*

1. Voidance: This policy will be void and of no legal force and effect in the event that any one of the following conditions occurs:

a. The property listed on the application is not eligible for coverage, in which case the policy is void from its inception;

b. the community in which the property is located was not participating in the National Flood Insurance Program on the policy's inception date and did not qualify as a participating community during the policy's term and before the occurrence of any loss for which the insured may receive compensation under the policy, in which case the policy is void from its inception;

c. If, during the term of the policy, the participation in the National Flood Insurance Program of the community in which the insured's property is located ceases, in which case the policy shall be deemed void effective at the end of the last day of the policy year in which such cessation occurred and shall not be renewed; in the event the voided policy included three policy years in a contract term of three years, the insured shall be entitledd to a pro-rata

refund of any premium applicable to the remainder of the policy's term after voidance of the policy;

d. The insured or the insured's agent has (i) sworn falsely or (ii) fraudulently or willfully concealed or misrepresented any material fact (including facts relevant to the rating of this policy) in the application for coverage, or upon any renewal of coverage, or in connection with the submission of any claim brought under the policy, in which case this entire policy shall be void as of the date the wrongful act was committed and coverage prior to the date of the wrongful act shall not be affected, provided, refunds of premiums, if any, shall be subject to offsets for the insurer's administrative expenses (including the payment of agent's commissions through prior policy years, if any) in connection with the issuance of the policy;

e. The premium submitted is less than $50.00 in connection with any application for a new policy or policy renewal, in which case the policy is void from its inception.

2. Reduction of coverage limits or reformation. In the event that the premium payment received by the insurer is not sufficient to purchase the amounts of building coverage and contents (personal property) coverage requested or in the event a rating error has been innocently made by the insured or the agent on the application, renewal, endorsement or other form (whether evident or not) resulting in insufficient premium being received by the insurer for the purchase of the amounts of coverage requested, then:

(i) If the insufficient premium or other rating error is discoverd by the insurer prior to a loss under the policy, the policy shall be deemed to provide only such coverage as can be purchased, for the entire term of the policy, with the amount of premium received; *Provided*, the insured may increase any reduced coverage(s) at any time by payment of the correct premium for the additional limits of coverage

requested and any such correct premium received by the insurer prior to any loss under the policy shall result in coverage being provided for the loss up to the additional amount of coverage requested by the insured; the application of the insufficient premium received to the provision of flood insurance coverage shall be made as follows:

A. In the event that only one kind of coverage (building coverage or contents coverage) has been requested, the insured shall receive the limits of that kind of coverage which can be purchased for the amount of premium received, less the expense constant;

B. In the event that both building coverage and contents coverage have been requested, the insurer shall determine the precentage ratio that each kind of insurance bears to the total amount of coverage requested, apportion the total premium received by the percentage ratio for each kind of coverage which can be purchased by the premium amount as apportioned for each kind of coverage; where both building and contents coverage are requested and a coverage's proportion of the premium paid is more than sufficient to obtain the amount of insurance requested for that coverage, any excess of that proportion of the total premium will be applied to obtain an additional amount of the other kind of coverge until the amount of insurance requested for the other coverage is obtained;

(ii) If the insufficient premium or other rating error is discovered by the insurer at the time of a loss under the policy, the policy shall be deemed to provide coverage pursuant to the provisions of (i), above, unless:

A. The insured or the insured's agent has sworn falsely or fraudulently or willfully concealed or misrepre-

sented any material fact (including facts relevant to the rating of this policy) in the application for coverage, or upon any renewal of coverage, or in connection with the submission of any claim brought under this policy, in which case this entire policy shall be void as of the date the wrongful act was committed and coverage prior to the date of the wrongful act shall not be affected, provided, refunds of premiums, if any, shall be subject to offsets for the insurer's administrative expenses (including the payment of agent's commissions through prior policy years, if any) in connnection with the issuance of the policy, or

B. Provided (ii)A., above, does not apply, the insured remits and the insurer receives the additional premium required to purchase (for the current policy term and the previous policy term if then insured) the limits of coverage for each kind of coverage as was initially requested by the insured withing thirty (30) days from the date the insurer gives the insured written notice of additional premium due, in which case the policy shall be reformed, from its inception date, to provide flood insurance coverage to the insured in the amount(s) of coverage initially requested. Silence or other failure to remit the additional premium required or non-recipt of such premium by the insurer within thirty (30) days from the date of notice of premium due, shall be deemed to be refusal to pay the additional premium due and any subsequent payment of the additional premium due shall not reform the policy from its inception date but shall only add the additional amounts of coverage to the policy for the remainder of its term, pursuant to 44 CFR 61.11, with any excess of premium paid being returned to the insured. *Provided, however,* under this subsection "B" as to any mortgagee (or trustee) named in this policy, the insurer shall give a notice of additional premium due

and the right of reformation shall continue in force for the benefit only of the mortgagee (or trustee), up to the amount of the insured indebtedness, for thiry (30) days after written notice to the mortgagee (or trustee); Provided, further, the Insurer is under no obligation to send the Insured any written notice of additonal premium due or notice of premium due under this subsection."

F. *Conditions Suspending or Restricting Insurance.* Unless otherwise provided in writing added hereto, the Insurer shall not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the Insured, provided, however, this insurance shall not be prejudiced by any act or neglect of any person (other than the insured), when such act or neglect is not within the control of the Insured.

G. *Alterations and Repairs.* Permission is granted to make alterations, additions and repairs, and to complete structures in course of construction. In the even of loss hereunder, the Insured is permitted to make reasonable repairs, temporary or permanent, provided such repairs are confined solely to the protection of the property from further damage and provided further that the Insured shall keep an accurate record of such repair expenditures. The cost of any such repairs directly attributable to damage by the peril insured against shall be included in determining the amount of loss hereunder. Nothing herein contained is intended to modify the policy requirements applicable in case loss occurs, and in particular the requirement that in case loss occurs the Insured shall protect the property from further damage.

H. *Property of Others (Servants and Guests Only).*

Unless otherwise provided in writing added hereto, loss to any property of others covered under this policy shall be adjusted with the Insured for the account of the owners of said property, except that the right to adjust such loss with said owners is reserved to the Insurer. Any such insurance under this policy shall not inure directly or indirectly to the benefit of any carrier or other bailee for hire.

I. *Liberalization Clause.* If during the period that insurance is in force under this policy, or within 45 days prior to the inception date thereof, on behalf of the Insurer there be adopted under the National Flood Insurance Act of 1968, or any acts amendatory thereof, any forms, endorsements, rules or regulations by which this policy could be extended or broadened, without additional premium charge, by endorsement or substitution of form, then such extended or broadened insurance shall inure to the benefit of the Insured hereunder as though such endorsement or substitution of form had been made.

J. *Policy Renewal.* The term of this policy commences on its inception date and ends on its expiration date, as shown on the "Declarations Page" which is attached to the policy. The Insurer is under no obligation to send any renewal notice or other notice that the policy term is coming to an end and the receipt of any such notice by the Insured, Mortgagee or Agent of the Insured shall not be deemed to be a waiver of this provision on the Insurer's part. The Insurer is under no obligation to assure that policy changes reflected in endorsements submitted by the Insured or Agent during the policy term and accepted by the Insurer are included in any renewal notice or new policy which is sent. "Policy changes" includes the addition of new coverage (e.g. contents coverage added to a building

coverage policy or vice versa) or any increases in the amounts of coverage.

This policy shall not be renewed and the coverage provided by it shall not continue into any successive policy term unless the premium payment for any such successive policy term is received by the National Flood Insurance Program (NFIP), prior to the expiration date of this policy, subject to "General Condition "E" ", above. The renewal premium payment shall be deemed to be received by the NFIP if the renewal payment is mailed to the NFIP prior to the expiration date and is received by the NFIP prior to or within five (5) days folloiwng the expiration date or if the renewal payment is mailed by certified mail to the NFIP prior to the expiration date.

In all cases, whether the renewal premium payment is received by the NFIP after the expiration date of the last policy term for which the premium was timely received the NFIP and the Insurer shall not be obliged to provide the Insured with any cancellation, termination, policy lapse, or policy renewal notice advising the Insured of any such cancellation, termination, policy lapse or policy renewal; *Provided, however*, with respect to any mortgagee (or trustee) name in the Declaration form attached to this policy, this insurance shall continue in force only for the benefit of such mortgagee (or trustee) for 30 days after written notice to the mortgagee (or trustee) of termination of this policy, and shall then terminate.

In connection with the renewal of this policy, the Insured will be requested during the policy term to recertify, on a Recertification Questionnaire provided by the Insurer, the rating information used to rate the most recent applica-

tion for or renewal of insurance.

Notwithstanding the above mentioned responsibility of the Insured to submit the appropriate renewal premium in sufficient time to permit its receipt by the NFIP prior to the expiration of the policy being renewed, the Insurer has established a business procedure for mailing renewal notices to assist Insureds in meeting their responsibility. Regarding the Insurer's business procedure, evidence of the placing of any such notices into the U.S. Postal Service, adressed to the Insured at the address appearing on the Insured's most recent application or other appropriate form (received by the NFIP prior to the mailing of the renewal notice by the Insurer), does, in all respects, for purposes of the NFIP presumptively establish delivery to the Insured for all purposes irrespective of whether the Insured actually received the notice. However, in the event that the Insurer determines that, through any circumstances, any renewal notice was not placed into the U.S. Postal Service, or, if placed, was prepared or addressed in a manner which the Insurer determines could preclude the likelihood of it being actually and timely received by the Insured prior to the due date for the renewal premium the following procedures shall be followed:

In the event that the Insured or his agent notifies the Insurer, not later than one year after the date on which the payment of the renewal was due, of a non-receipt of a renewal notice prior to the due date for the renewal premium, which the Insurer determines was attributable to the above circumstances, the Insurer shall mail a second bill providing a revised due date, which shall be thirty days after the date on which the bill is mailed. If the renewal payment is received by such revised due date, the policy

shall be renewed as of the date on which the prior policy would have expired. If the renewal payment requested by reason of the second bill is not received by the revised due date, no renewal shall occur and the policy shall remain an expired policy as of the expiration date prescribed on the policy.

K. *Cancellation of Policy or Reduction in Amount of Insurance.* This policy may be cancelled at any time at the request of the Insured, in which case the Insurer shall, upon demand and surrender of this policy, refund the excess of paid premiums above the pro-rata premium earned with retention of the expense constant; provided, however, that the premium paid for the then current policy term shall be fully earned if the Insured retains an interest in the property covered at the location described in the application and declarations form.

The amount of insurance under this policy may be reduced at any time at the request of the Insured, in which case the Insurer shall, upon demand, refund the excess of paid premium above the pro-rata premium earned for the amount of the reduction; provided, however, that the premium paid for the then current policy term shall be fully earned to the extent that the Insured retains an interest in the property covered at the location described in the application and declarations form.

This policy, if it is a policy for a term of three years, may be cancelled at any of its anniversary dates at the request of the Insured, provided, a policy of flood insurance has been obtained or is being obtained in substitution for this policy and the insurer receives a written concurrence in the cancellation from any mortgagee of which the insurer

has actual notice; or the Insured has extinguished the insured mortgage debt and is no longer required by the mortgagee to maintain the coverage. In such event, the premium refund shall be on a short-rate basis.

L. *Loss Clause.* Payment of any loss under this policy shall not reduce the amount of insurance applicable to any other loss during the policy term which arises out of a separate occurrence of the peril insured against hereunder provided, that all loss arising out of a continuous or protracted occurrence shall be deemed to constitute loss arising out of a single occurrence.

M. *Mortgagee Clause (Applicable to building items only and effective only when policy is made payable to a mortgagee (or trustee) named in the application and declarations form attached to this policy or of whom the Insurer has actual notice prior to the payment of loss proceeds under this policy):* Loss, if any, under this policy, shall be payable to the aforesaid as mortgagee (or trustee) as interest may appear under all present or future morgages upon the property described in which the aforesaid may have an interest as mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; *Provided*, That in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided, also, that the mortgagee (or trustee) shall notify the Insurer of any change of ownership or occupancy or increase of hazard which shall come to the knowlege of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

If this policy is cancelled by the Insurer, it shall continue in force for the benefit only of the mortgagee (or trustee) for 30 days after written notice to the mortgagee (or trustee) of such cancellation and shall then cease, and the Insurer shall have the right, on like notice, to cancel his agreement.

Whenever the Insurer shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, the Insurer shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment, and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of said mortgagee's (or trustee's) claim.

N. *Mortgagee Obligations.* If the Insured fails to render proof of loss, the named mortgagee (or trustee),

upon notice, shall render proof of loss in the form herein specified within 60 days thereafter and shall be subject to the provisions of this policy relating to appraisal and time of payment and of brining suit.

O. *Loss Payable Clause (Applicable to contents items only).* Loss, if any, shall be adjusted with the Insured and shall be payable to the Insured and loss payee as their interests may appear.

P. *Requirements in Case of Loss.* The Insured shall give written notice, as soon as practicable, to the Insurer of any loss, protect the property from further damage, forthwith separate the damaged and undamaged property and put it in the best possible order. Within 60 days after the loss, unless such time is extended in writing by the Insurer, the Insured shall render to the Insurer, a proof of loss, signed and sworn to by the Insured as to the following: the time and origin of the loss, the interest of the Insured and of all others in the property, actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss. The Insured, at the option of the Insurer, may be required to furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed, and verified plans and specifications of any building, fixtures or machinery destroyed or damaged.

The Insured, as often as may be reasonably required, shall exhibit to any person designated by the Insurer all that remains of any property herein described, and submit to examinations under oath by any person named by the Insurer, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Insurer or its representative, and shall permit extracts and copies thereof to be made.

The Insurer may, at its option, waive the requirement for the completion and filing of a Proof of Loss in certain cases, in which event the Insured will be required to sign and, at the Insurer's option, swear to an adjuster's report of the loss which includes information about the loss and the damages needed by the Insurer before the loss can be adjusted.

Any false statements made in the course of presentment of a claim under this policy may be punishable by fine or imprisonment under the applicable Federal laws.

Q. *Appraisal.* In case the Insured and the Insurer shall fail to agree as to the actual cash value of the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterest umpire; and failing for 15 days to agree upon such umpire, then, on request of the Insured or the Insurer, such umpire shall be sleected by a judge of a court of record in the State in which the insured property is located. The

appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with the Insurer shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

R. *Options.* It shall be optional with the Insurer to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within 30 days after the receipt of the proof of loss herein required.

S. *Abandonment.* There shall be no abandonment of the Insurer of any property.

However, the Insurer may permit the Insured to keep damaged, insured property ("salvage") after a loss and reduce the amount of the loss proceeds payable to the Insured under the policy by the value of the salvage.

T. *When Loss Payable.* Loss is payable within 60 days after the Insured files the proof of loss (or within 90 days after the insurance adjuster files an adjuster's report signed and sworn to by the Insured in lieu of a proof of loss) and ascertainment of the loss is made either by agreement between the Insurer and the Insured, expressed in writing, or by the filing with the Insurer of an award as provided in paragraph "Q", above. If the Insurer rejects the Insured's proof of loss in whole or in part, the Insured may accept such denial of the claim, or exercise the Insured's rights

under this policy, or file an amended proof of loss as long as it is filed within 60 days of the date of the loss or any extension of time allowed by the Administrator.

U. *Action Against the Insurer.* No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after the date of mailing of notice of disallowance or partial disallowance of the claim. An action on such claim against the Insurer may be instituted, without regard to the amount in controversy, in the United States District Court for the district in which the property shall have been situated.

V. *Subrogation.* In the event of any payment under this policy, the Insurer shall be subrogated to all the Insured's right of recovery therefor against any party, and the Insurer may require from the Insured an assignment of all rights of recovery against any party for loss to the extent that payment therefor is made by the Insurer. The Insured shall do nothing after loss to prejudice such right; however, this insurance shall not be invalidated should the Insured waive in writing prior to a loss any or all right of recovery against any party for loss occurring to the described property.

IN WITNESS WHEREOF, the Insurer has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized representative of the Insurer.

GLORIA M. JIMENEZ,
Federal Insurance Adminstrator.

Endorsement 1
Condominium Association Endorsement

If the named Insured on this policy is a condominium association, then at the time of loss by flood the following terms, subject to all other provisions of the policy, will apply:

1. The building coverage of this policy, subject to the stated limits will cover damage to all building items covered under the policy and owned in common by the condominium association members.

2. The building coverage of this policy, subject to the stated limits, is extended to cover damage to all structural items within the Individual Condominium Units, including walls, floors, ceilings, and their related coverings, such as paint, paper, panelling, carpeting, and tile. Also covered are installed appliances for heating, cooling, plumbing and electrical purposes. The structural items may be original installations or replacement or additional items.

3. The building coverage outlined in paragraph 2 above has application only to the extent that the policy's stated limits have not been exhausted under paragraph 1.

4. The policy deductible relating to the building coverage shall be applied against the total damage to all of the buildng's structural elements and not against the covered loss, and shall not be applied separately in the case of each unit sustaining damage.

5. The contents coverage of this policy covers damage, subject to the stated limits, to all contents items

owned in common by the association members and contained in the insured building or removed therefrom in accordance with the policy's terms.

6. The policy deductible relating to contents coverage shall be applied agains the total damage to all contents owned in common by the condominium association members and contained in the insure building or removed therefrom in accordance with the policy's terms and not against the covered loss.

7. Loss under this endorsement shall be adjusted with the condominium association and shall be payable to the insurance trustee of record, as designated by the association.

(National Flood Insurance Act of 1968, as amended (Title XII of the Housing and Urban Development Act of 1968), 42 U.S.C. 4001-4128; Reorganization Plan No. 3 of 1978 (43 FR 41934), Executive Order 12127, dated March 31, 1979 (44 FR 19367) E.O. 11988, dated May 24, 1977 and 44 CFR 9, Delegation of Authority to Federal Insurance Administrator)

[43 FR 2570, Jan. 17, 1978, as amended at 44 FR 32215, June 5, 1979. Redesignated at 44 FR 31177, May 31, 1979 and amended at 47 FR 19147, May 4, 1982; 48 FR 39069, Aug. 29, 1983; 48 FR 42818, Sept. 20, 1983; 49 FR 33658, Aug. 24, 1984]

42 U.S.C. §4053

Adjustment and payment of claims; judicial review; limitations; jurisdiction

This insurance companies and other insurers which

form, associate, or otherwise join together in the pool under this part may adjust and pay all claims for proved and approved losses covered by flood insurance in accordance with the provisions of this chapter and, upon the disallowance by any such company or other insurer of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance of the claim, may institute an action on such claim against such company or other insurer in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.
Pub.L. 90-448, Title XIII, § 1333, Aug. 1, 1968, 82 Stat. 583.

42 U.S.C. §4072

Adjustment and payment of claims; judicial review; limitations; jurisdiction

In the event the program is carried out as provided in section 4071 of this title, the Secretary shall be authorized to adjust and make payment of any claims for proved and approved losses covered by flood insurance, and upon the disallowance by the Secretary of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Secretary, may institute an action against the Secretary on such claim in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and

jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.

Pub.L. 90-448, Title XIII, § 1341, Aug. 1, 1968, 82 Stat. 584.

44 C.F.R. 59.24

§ 59.24 Suspension of community eligibility.

(a) A community eligible for the sale of flood insurance shall be subject to suspension from the Program for failing to submit copies of adequate flood plain management regulations meeting the minimum requirements of paragraphs (b), (c), (d), or (e) of § 60.3 or paragraph (b) of § 60.4 or §60.5, within six months from the date the Associate Director provides the data upon which the flood plain regulations for the applicable paragraph shall be based. Where there has not been any submission by the community, the Associate Director shall notify the community that 90 days remain in the six month period in order to submit adequate flood plain management regulations. Where there has been an inadequate submission, the Associate Director shall notify the community of the specific deficiencies in its submitted flood plain management regulations and inform the community of the amount of time remaining within the six month period. If, subsequently, copies of adequate flood plain management regulations are not received by the Associate Director, he shall, no later than 30 days before the expiration of the original six month period, provide written notice to the community and to the state and assure publication in the *Federal Register* under Part 64 of this subchapter, of the community's loss of eligibility for the sale of flood insurance, such suspension

to become effective upon the expiration of the six month period. Should the community remedy the defect and the Associate Director receive copies of adequate flood plain management regulations within the notice period, the suspension notice shall be rescinded by the Associate Director. If the Associate Director recieves notice from the State that it has enacted adequate flood management regulations for the community within the notice period, the suspension notice shall be rescinded by the Associate Director. The community's eligibilty shall remain terminated after suspension until copies of adequate flood plain management regulations have been received and approved by the Associate Director.

(b) A community elegible for the sale of flood insurance which fails to adequately enforce or repeals its flood plain management regulations meeting the minimum requirements set forth in §§ 60.3, 60.4 or §60.5 shall be subject to suspension of its Program eligibility. Under such circumstances, the Associate Director shall grant the community 30 days in which to show cause why it should not be suspended. The Associate Director may conduct a hearing before commencing suspensive action. If a community is to be suspended, the Associate Director shall inform it upon 30 days prior written notice and publication in the *Federal Register* under Part 64 of this subchapter of its loss of eligibility for the sale of flood insurance. In the event of impending suspension, the Associate Director shall issue a press release to the local media explaining the reasons and effects of the suspension. The community's eligibility shall only be reinstated by the Associate Director upon his receipt of a local legislative or executive measure reaffirming the community's formal intent to adequately enforce the flood plain management regulations

adopted in compliance with the requirements of this subpart, together with evidence of action taken by the community to abrogate, to the maximum extent possible, the action(s) which caused the suspension. In such cases, the Associate Director, in order to evaluate the community's performance under the terms of its submission, may either conditionally reinstate the community's eligibility or withhold reinstatement for a period not to exceed one year from the date of his receipt of the submission.

(c) The Administrator shall promptly notify the servicing agent and any insurers issuing flood insurance pursuant to an arrangement with the Administrator of those communities whose eligibility has been suspended. Flood insurance shall not be sold or renewed in any suspended community. Policies sold or renewed within a community during a period of ineligibility are deemed to be voidable by the Administrator whether or not the parties to sale or renewal had actual notice of the ineligibility.

Supreme Court, U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-332

In the Supreme Court of the United States

OCTOBER TERM, 1985

PARISH OF ST. BERNARD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, the Parish of Jefferson, Louisiana, and the Jefferson Parish Council,[1] seek review of the court of appeals' decision remanding this case to the district court to allow the United States to proceed on subrogation and possible other claims under state law arising out of flood insurance policies issued by the federal government.

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[1] The other defendants in these consolidated cases have not petitioned for certiorari.

1. a. Petitioners voluntarily participate in the National Flood Insurance Program (NFIP) pursuant to the National Flood Control Act, 42 U.S.C. 4001 *et seq.* By virtue of their participation, several thousand property owners in the Parish became eligible for federal flood insurance.

Following severe floods in 1978, 1980, and 1982, the United States paid millions of dollars in insurance claims to persons in the Parish covered by NFIP policies. Thereafter, the United States filed actions in the United States District Court for the Eastern District of Louisiana to obtain damages and injunctive relief against the Parish and other defendants. The government alleged that the failure of the Parish and other defendants to implement various flood control measures, contrary to their obligations under the NFIP, had proximately caused the flood damage. The United States advanced several theories of liability based on contractual rights against the parishes, an implied right of action under the National Flood Control Act, a right of subrogation to the claims that the insurance holders would have against the defendants under state law, and other state common law grounds.

b. The district court granted in part and denied in part the defendants' motions to dismiss or for summary judgment, and it entered a final judgment on the dismissed claims pursuant to Fed. R. Civ. P. 54(b). With respect to the government's subrogation and state common law claims, the court rejected the defendants' contentions, concluding that these theories presented valid causes of action (Pet. App. A37, A42-A48).[2]

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[2] The district court did rule against the government's public nuisance claim (Pet. App. A48-A57), and the government later abandoned the issue (*id.* at A3, A4).

c. The government appealed from the final judgment dismissing certain of its claims, and the Parish took an interlocutory appeal pursuant to 28 U.S.C. 1292(b) from the portion of the district court's order declining to dismiss the subrogation and common law claims. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A31). The court first held that the government had no contractual or implied statutory rights against the defendants (*id.* at A8-A14). With respect to the issue before this Court, the court of appeals held that the United States has a subrogation claim to the extent permitted by state law. In addition, the court ruled that other causes of action might be available to the government insofar as they are allowed under state common law, and it left the development of these remedies to further proceedings in the district court. *Id.* at A3, A15-A26; *id.* at A26 (Williams, J., concurring in part and dissenting in part).

2. The decision of the court of appeals is interlocutory and does not represent a complete adjudication of petitioners' liability. Moreover, the ruling below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

a. As explained above, the district court rejected petitioners' argument that the United States does not have valid subrogation and other state common law claims, and the court of appeals granted interlocutory review of that ruling pursuant to 28 U.S.C. 1292(b). Thus, there has been no final judgment adjudicating petitioners' liability, if any, to the United States. Indeed, the court of appeals held only that the National Flood Control Act does not preclude the government's subrogation claim and that

such a claim is available under the NFIP to the extent permitted by Louisiana law; the ultimate determination of liability will therefore depend upon the resolution of numerous issues of state and perhaps federal law that have not yet been considered. If petitioners prevail in further proceedings in the district court, their contention in the petition will be moot. Conversely, if petitioners are eventually found to be liable and that judgment is affirmed on appeal, petitioners will be able to present to this Court the argument they now raise, together with any others they may have, in a petition for a writ of certiorari seeking review of a final judgment against them.

In addition, the court of appeals recognized that claims other than subrogation might be available to the United States under state common law but that no definite decision could be made "at this early stage of litigation" (Pet. App. A25). While petitioners challenge the court of appeals' ruling on the subrogation issue, they do not address these other state law claims. Thus, the question presented by petitioners would not in any event dispose of this case.

In these circumstances, review of the court of appeals' decision would be premature at this time.

b. At all events, petitioners' argument is without merit. Relying on *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947), petitioners contend (Pet. 7) that specific statutory authority is necessary for the United States to assert a common law right such as subrogation. However, it is well settled that the United States has the inherent authority to invoke common law remedies. See, *e.g.*, *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *United States* v. *Tingey*, 30 U.S. (5 Pet.) 115, 127-128 (1831);

United States v. *Marion County School District*, 625 F.2d 607, 611 (5th Cir. 1980), cert. denied, 451 U.S. 910 (1981). Indeed, *Standard Oil* itself seemingly recognized that right (332 U.S. at 306-307), although it declined, in the face of federal statutes addressing related situations, to extend the federal common law to provide the particular cause of action at issue. See *id.* at 315-316 & n.22.

This authority of the government is especially appropriate in the circumstances of the present case. As the court of appeals explained (Pet. App. A16-A17), the United States is acting as an insurer here, and the subrogation rights it seeks to invoke are no different from those available to private insurers under the same circumstances. The government has simply taken over the insurance function performed by private insurers in the early years of the NFIP, and there is no reason why basic insurance principles should not continue to be effective. Furthermore, the standard insurance contract used for policies issued by the government, which was promulgated as part of the regulations of the administering agency (see 44 C.F.R. Pt. 61 App. A; Pet. App. A127), has long included a subrogation clause typical of those in private insurance contracts; this clause expressly allows the government, in the event of payment of a claim, to stand in the shoes of the claimant to enforce any legal rights the claimant may have against others in connection with the loss. Thus, the United States simply seeks to enforce common law rights that would be available to a private party engaged in the same activity. See *Industrial Indem. Ins. Co.* v. *United States*, 757 F.2d 982 (9th Cir. 1985); *United States* v. *Bender Welding & Machine Co.*, 558 F.2d 761 (5th Cir. 1977).

In addition, even if statutory authorization were necessary for the government to invoke a subrogation right, that requirement would be satisfied here. As noted by the court below, the National Flood Insurance Program was " 'designed to operate much like any other private insurance company,' " and the National Flood Control Act establishing the program makes " 'clear that Congress did not intend to abrogate standard insurance law principles' " (Pet. App. A16 (emphasis omitted), quoting *Drewett* v. *Aetna Casualty & Surety Co.*, 539 F.2d 496, 498 (5th Cir. 1976)). See also Pet. App. A9 (citation omitted) (issues concerning NFIP "are resolved under federal law 'by drawing upon standard insurance law principles' "). In accord with these principles, and pursuant to the authority that "Congress delegated to the agency * * * for writing the regulations under which the NFIP would operate" (Pet. App. A17), the agency administering the NFIP has adopted a regulation providing for a subrogation clause in the insurance policies issued by the government (see page 5, *supra*). This provision is, as the court of appeals correctly concluded, "within the framework contemplated by Congress" (*id.* at A21).

Petitioners argue (Pet. 8-10) that, under *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), Congress must specifically create a cause of action for subrogation if one is to exist. This argument is misconceived. The cited cases involve the question whether a contractual or implied statutory cause of action has been created by Congress, and the court of appeals relied on those decisions in finding that no contractual or implied statutory right is available to the government in this

case (Pet. App. 9a-13a). However, as the decision below reflects, they do not bear on the distinct question of a subrogation remedy. That remedy is not a contractual or direct action created by federal statute. Rather, the underlying claim of the property owners against petitioners is created by state law, and the right to enforce that claim is transferred from the federally insured property owners to the United States under conventional subrogation principles.[3] No new liability is created, and the cases cited by petitioners, regarding the standards for determining whether Congress intended to establish new causes of action, are inapposite.[4]

Nor, contrary to petitioners' assertion (Pet. 8), does the National Flood Control Act preempt a common law subrogation remedy under *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). Petitioners have pointed to no reason to assume that Congress, in establishing a statutory program for the federal government to engage in the business of insurance, intended to deprive the government of the ability to protect the public fisc under established principles of insurance law. The only remedies specifically pro-

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[3] This analysis also disposes of petitioners' contention that imposition of liability under a subrogation theory would be "unconscionable" (Pet. 10-12). Petitioners' liability to the government will be no greater under this theory than the liability they would have had in any event, under state law, to the individual property holders harmed by the Parish's wrongful conduct.

[4] In addition, unlike the situation in *Pennhurst*, petitioners were well aware of the obligations imposed on them by their agreement to participate in the NFIP. See Pet. App. A28-A29 (Williams, J., concurring in part and dissenting in part); compare Pet. App. A10.

vided in the statute, which involve actions on insurance claims against the government or private insurers (42 U.S.C. 4053, 4072), plainly do not "speak directly" (*City of Milwaukee*, 451 U.S. at 315) to the availability of a subrogation right by the insurer against the responsibile tortfeasor. The other provision cited by petitioner, which authorizes a noncomplying locality to be suspended from the flood insurance program, is not contained in the statute but instead was established by administrative regulation (see 44 C.F.R. 59.24), and thus it affords no basis to infer that Congress intended to displace the traditional right of subrogation as an available remedy to protect the government's financial interest in the program.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20058